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No. 17678

United States Court of Appeals

for the Ninth Circuit

SERVETTE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition to Review an Order of the National Labor Relations Board.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 13, California,

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MARCEL MALLET-PREVOST,
Assistant General Counsel,

National Labor Relations Board,
Washington 25, D.C.

Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT NO. 1-A

Form NLRB-508

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

* * * * *

Case No. 21-CC-359. Date Filed: 3-10-60.

1. Labor Organization or its Agents Against Which Charge Is Brought:

Name 1. Wholesale Delivery Drivers & Salesmen's Local No. 848, 1616 West 9th Street, Room 223, Los Angeles, California—2. Central Labor Council of Los Angeles County, AFL-CIO, 108 West 7th Street, Los Angeles, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section (8b) subsection(s) (4)(A) and (4)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

(i) Engaged in, induced and encouraged individuals employed by persons engaged in commerce and in industries affecting commerce to engage in a strike and

a refusal in the course of their employment to use, process, transport and otherwise handle and work on goods, articles, materials and commodities, and to perform services; and (ii) Threatened, coerced and restrained person and persons engaged in commerce and in industries affecting commerce; and, In both cases with objects thereof of forcing and requiring employers and self-employed persons to join a labor organization and to enter into agreements prohibited by Section 8(e); and for the further objects of forcing and requiring persons to cease using, selling, handling, transporting, or otherwise dealing in the products handled by and distributed by Servette, Inc., and to cease doing business with Servette, Inc., and to force and require Servette, Inc., to recognize and bargain with said Teamsters as the representative of its employees.

3. Name of Employer: Servette, Inc.

4. Location of Plant Involved: 2400 San Fernando Road, Los Angeles 65, California.

5. Type of Establishment: Distributor.

6. Identify Principal Product or Service: Specialty merchandise, as candy, liquor, etc.

7. No. of Workers Employed: 2 Warehousemen only.

8. Full Name of Party Filing Charge: Servette, Inc.

9. Address of Party Filing Charge: 2400 San Fernando Road, Los Angeles 65, California.

10. Tel. No.: CApitol 5-2263.

11. Declaration: I Declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

HILL, FARRER & BURRILL,
/s/ By CARL M. GOULD and
EDWIN H. FRANZEN,
/s/ By EDWIN H. FRANZEN,

Signature of Representative or person making charge.

Note: Kindly Send Copies of All Documents to Hill, Farrer & Burrill, 411 W. 5th St., Los Angeles 13, Cal. Attorneys for Servette, Inc.
Dated: March 10, 1960.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-B

Extension 892
March 10, 1960

Wholesale Delivery Drivers & Salesmen's
Local No. 848

1616 W. 9th St., Rm. 223
Los Angeles, Calif.

Central Labor Council of Los Angeles
County, AFL-CIO

108 W. 7th St.
Los Angeles, Calif.

Re: 1. Wholesale Delivery Drivers & Salesmen's Local No. 842 2. Central Labor Council of Los Angeles County, AFL-CIO (Servette, Inc.)

Case No. 21-CC-359

NOTICE OF FILING OF CHARGE

Gentlemen:

Pursuant to the provisions of the National Labor Relations Act, as amended, a charge alleging the commission of unfair labor practices within the meaning of the Act has been filed with this office. A copy of the charge is enclosed.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the charge.

The case has been assigned to Paul Cummings, Attorney whom you should contact if you have any questions or desire to discuss the case.

Very truly yours,

Ralph E. Kennedy
Regional Director.

Certificate of Service by Mail and Post office Return Receipt Attached.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

COMPLAINT AND NOTICE OF HEARING

It having been charged by Servette, Inc., herein called Servette, that Wholesale Delivery Drivers & Salesmen's Union, Local No. 848, herein called Respondent, has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8.

1. The charge was filed by Servette on March 10, 1960, and a copy was served on Respondent, by registered mail, on that date.

2. Servette, a California corporation, is engaged as a wholesale distributor of candy, holiday supplies and specialty merchandise, having its warehouse and prin-

cipal place of business at Los Angeles, California. During the past year in the operation of its said business, Servette purchased and received, at its Los Angeles warehouse, goods and commodities which were shipped to it directly by suppliers from outside the State of California, valued at in excess of $50,000.

3. Servette, Kory's Markets, Inc., McDaniels Markets and Daylight Markets are, and each of them is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

5. Kory's Markets, Inc., McDaniels Markets and Daylight Markets, herein respectively called Kory, McDaniels and Daylight, are engaged in the operation of chain retail food supermarkets in the Los Angeles, California, metropolitan area. Kory, McDaniels and Daylight each, in the course and conduct of its said business, annually sells foodstuffs and commodities valued at in excess of $500,000, and annually purchases foodstuffs, supplies and commodities which are shipped to it in California by suppliers from outside the State of California, valued at in excess of $50,000.

The supermarkets operated by Kory, McDaniels and Daylight regularly and customarily purchase, handle, stock and sell the products distributed by Servette.

6. Since on or about February 1, 1960, the Respondent has been engaged in a labor dispute with Servette, and has struck and picketed Servette's wharehouse at Los Angeles, California.

7. Since on or about February 3, 1960, the Respondent has engaged in a campaign or program to enlist

the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's strike against Servette, and to promote a boycott by dealers and consumers of such products.

8. Pursuant to said program and campaign as set forth in paragraph 7 above and in furtherance of the Respondent's strike aforesaid, since on or about February 3, 1960, the Respondent has requested, solicited and appealed to individuals employed by Kory, McDaniels, Daylight and by other retail food markets in the Los Angeles metropolitan area to refuse to buy, sell, use, handle or work on the products sold and distributed by Servette, and to discontinue doing business with Servette and the route drivers delivering such products. As a consequence, store managers employed by such markets have refused to order, buy or accept delivery of such products.

9. Also pursuant to said program and campaign as set forth in paragraphs 7 and 8 above and in support of the Respondent's strike aforesaid, since on or about February 3, 1960, the Respondent has threatened, coerced and restrained Kory and other retail food markets by requesting and appealing to consumers, customers of Kory and other retail food markets in the Los Angeles metropolitan area, not to purchase from such markets certain name-brand products sold there, by means of handbills distributed by Respondent at the entrances to their retail establishments which falsely represented that such products, i.e., Good Season Salad Dressing and Old London Products, were distributed to the retail markets by Servette.

10. By the acts and conduct set forth in paragraphs 8 and 9 above, the Respondent has induced or encourage individuals employed by Kory, McDaniels, Daylight and by other persons engaged in commerce or in an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced or restrained Kory and other persons engaged in commerce or in an industry affecting commerce.

11. An object of the acts and conduct of the Respondent as set forth in paragraphs 8 through 10 above was and is to force or require Kory, McDaniels, Daylight and other persons to cease using, selling, handling, transporting, or otherwise dealing in the products sold and distributed by Servette, and to cease doing business with Servette and route drivers delivering such products.

12. The acts and conduct of the Respondent set forth in paragraphs 8 through 11 above, occurring in connection with the operations of Servette and the operations of Kory, McDaniels and Daylight, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead, and do lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The aforesaid acts of the Respondent set forth in paragraphs 8 through 12 above constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) and (ii) (B) and Section 2 (6) and (7) of the Act.

Please Take Notice that on the 8th day of August 1960, at 10:00 a.m., PDT, in Hearing Room No. 1, on the Mezzanine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated At Los Angeles, California, this 5th day of July 1960.

/s/ RALPH E. KENNEDY,
Regional Director,
National Labor Relations Board,
Region 21,
849 South Broadway,
Los Angeles 14, California.

[Note: Affidavit of Service and Return Posted Receipts Attached (Ex. 1-D)].

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-E

[Title of Board and Cause.]

ANSWER TO COMPLAINT

Comes now Respondent and for Answer to the Complaint:

1. Admits the allegations in paragraphs 1 through 7 of the Complaint.

2. Denies the allegations contained in paragraphs 8, 10, 11, 12 and 13 of the Complaint.

3. Answering paragraph 9, admits that Respondent has from time to time distributed handbills to members of the public in the greater Los Angeles area requesting such members of the public not to purchase or consume certain products sold in retail stores, for the reason that Servette was one of the distributors of such products and had engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act as more particularly set forth in the Complaint issued by the General Counsel of the Board in Case No. 21-CA-3869, presently awaiting decision by a Trial Examiner.

4. The distribution of handbills by Respondent, as alleged in paragraph 9 of the Complaint, was an expression and disemination of views, arguments and opinions and does not therefore constitute nor is it any evidence of an unfair labor practice under any of the provisions of the Act as provided in Section 8(c) thereof.

5. The distribution of handbills by Respondent, as alleged in paragraph 9 of the Complaint, was and is an

exercise of the rights of free speech and press guaranteed by the First Amendment to the United States Constitution and the Board is without constitutional power or authority to engage in any pre-publication restraint or censorship of such activities, whether based upon the alleged falsity of the leaflets, or otherwise.

Dated at Los Angeles, California, this 12th day of July, 1960.

/s/ CHARLES K. HACKLER,
Attorney for Respondent
1621 West Ninth Street,
Los Angeles 15, California.

Affidavit of Service by Mail Attached.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-F

[Title of Board and Cause.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Comes now Respondent in the above matter and moves the Trial Examiner for an order requiring the General Counsel to make paragraph 9 of the Complaint herein more definite and certain in the following respects:

It is alleged in said paragraph that Respondent has "threatened, coerced and restrained Kory and other retail food markets by requesting and appealing to con-

sumers, customers of Kory and other retail food markets in the Los Angeles metropolitan area . . . by means of handbills . . . which falsely represented that such products . . . were distributed to the retail markets by Servette."

Respondent cannot determine from the underscored portions of paragraph 9 the names or locations of such "other retail food markets", to whose consumers and customers the Union allegedly addressed false leaflets. Respondent cannot adequately prepare its defense unless and until the Complaint is rendered more certain by stating the names of such markets and their locations and particularizing the manner, means, times and places constituting the allegedly false propagandizing on the part of the Union.

In this connection, counsel represents that the Union engaged in an extremely widespread appeal to the consuming public in the whole greater Los Angeles area through the use of leaflets in an effort to induce the public to refrain from buying or using products, the sale of which would enable Servette to continue to refuse to bargain in good faith with the Union. If such leafleteering is to be censored by the Board, it seems only fair that the specific area of censorship should be set out with particularity in the Complaint.

Wherefore, Respondent moves the Regional Director to forthwith transmit a copy of this Motion to the Associate Chief Trial Examiner of the Board for a ruling, sufficiently in advance of the hearing to afford Respondent a reasonable opportunity to prepare its defense to any amendment which the Associate Chief Trial Examiner may order made.

Dated at Los Angeles, California, this 12th day of July, 1960.

/s/ CHARLES K. HACKLER,
Attorney for Respondent,
1621 West Ninth Street,
Los Angeles 15, California.

Affidavit of Service by Mail Attached.
Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-G

[Title of Board and Cause.]

ANSWER OF COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S MOTION TO MAKE MORE DEFINITE AND CERTAIN

In response to Respondent's Motion, Counsel for the General Counsel hereby states that no evidence of unfair labor practices under paragraph 9 of the Complaint shall be proffered other than as to an employer named in said paragraph.

Dated at Los Angeles, California, this 20th day of July 1960.

/s/ PAUL D. CUMMINGS,
Counsel for the General Counsel,
National Labor Relations Board.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-H

[Title of Board and Cause.]

ORDER

Motion to Make More Definite and Certain having been filed with the undersigned on July 13, 1960.

It is hereby ordered that the same be, and it hereby is, referred to the Associate Chief Trial Examiner, National Labor Relations Board, for ruling.

Dated at Los Angeles, California, this 20th day of July 1960.

/s/ RALPH E. KENNEDY,
Regional Director,
National Labor Relations Board,
Twenty-First Region.

[Note: Affidavit of Service and Return Postal Receipts Attached (Ex. 1-I).]

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-J

[Title of Board and Cause.]

RULING ON MOTION

Counsel for the Respondent having moved for an order requiring the General Counsel to make paragraph 9 of the Complaint more definite and certain in some respects; Counsel for the General Counsel having an-

swered that no evidence as to unfair labor practices under this paragraph will be offered except as to threats, coercions and restraints designed to affect a business relation between Kory's Markets, Inc. and Servette, Inc. by means of requests and appeals contained in handbills directed to consumers and customers of Kory's Markets, Inc.; and it now appearing that paragraph 9 is more definite and certain, the motion is denied.

/s/ WALLACE E. ROYSTER,
Trial Examiner

Dated July 21, 1960.

[Note: Affidavit of Service by Mail Attached (Ex. 1-K).]

Admitted in Evidence August 8, 1960.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

Paul D. Cummings, Esq., for the General Counsel.

Charles K. Hackler, Esq., of Los Angeles, Calif., for the Respondent.

Before: Wallace E. Royster, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This matter was tried before me in Los Angeles, California, on August 8, 1960. Upon a charge filed by Servette, Inc., herein Servette; the General Counsel of the National Labor Relations Board issued his complaint alleging that Wholesale Delivery Drivers & Salesmen's Union, Local No. 848, herein the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the National Labor Relations Act. as amended, 61 Stat. 136, 73 Stat. 519 herein the Act.

Upon the entire record in the case I make the following:

Findings of Fact

I. The business entities involved

Servette is a California corporation engaged in and near Los Angeles, California, in the distribution at wholesale of candy, holiday supplies and specialty merchandise. During the past year Servette purchased and received from points outside the State of California goods and commodities to a value exceeding $50,000.

Kory's Markets, Inc., McDaniels Markets and Daylight Markets, herein respectively Kory, McDaniels and Daylight, separately operate chain retail food supermarkets in the Los Angeles area. Each annually sells

foodstuffs and commodities valued at more than $500,000, and annually purchases foodstuffs supplies and commodities from suppliers located outside the State of California to a value in excess of $50,000. Kory, McDaniels and Daylight regularly and customarily purchase, handle, stock and sell products distributed by Servette.

II. The alleged unfair labor practices

The Respondent, concededly a labor organization within the meaning of Section 2(5) of the Act, since early February 1960[1] has been engaged in a labor dispute with Servette and has struck and picketed Servette's warehouse in Los Angeles.

In the period from February 3 through March 10, the Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of retail markets stocking products distributed by Servette by encouraging such markets to cease doing business with Servette. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

The testimony of Kenneth Kennish, manager for McDaniels in Maywood, California, is that within the period mentioned agents of the Respondent told him they had a dispute with Servette and asked him to cease dealing with Servette. The agents warned Kennish that if he failed to cooperate they would pass out handbills to customers. The handbills were in the form below:

[1] All the incidents involving the Respondent took place in 1960.

To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight.

The handbills were passed out by Respondent's agents but Kennish continued his purchases from Servette.

Sam Gross, the manager of another McDaniels Market, testified that within the same period agents of Respondent asked him to remove merchandise distributed by Servette from his shelves. No threat to handbill customers was made on this occasion. At a meeting of McDaniels' managers, according to Gross, they were told by higher officials to use their best judgment in the matter and to do as they thought wise. Gross either diminished his purchases from or ceased doing business with Servette.

The testimony of Maurice Hattem, another McDaniels' manager, is that an agent of Respondent requested him not to handle Servette merchandise and showed him the handbill reproduced above, without saying that it would be distributed. Hattem diminished the amount of business that he gave to Servette or terminated it.

The testimony of Henry Tessler, a manager of a Daylight market, is that agents of the Respondent in the period mentioned told him of the dispute with Servette and asked him to cooperate by not handling Servette products. The agents said that they were passing out handbills to the customers of those markets who refused cooperation. The agents left the store and did not handbill.

The testimony of Pete Givigliano, manager of a Kory market, is that in late February agents of the Respondent told him of the dispute with Servette and showed the handbill, saying that they were going to pass these out to Kory customers unless Kory ceased doing business with Servette. The manager answered that he must get advice from the Kory central office. Some handbilling then was done by Respondent's agents to customers of that market. The next week the manager refused to permit Servette to stock the shelves and advised Servette that this action was taken because of the handbill. Agents of the Respondent on two subsequent occasions visited the market to assure themselves that Servette merchandise was not on display.

The testimony of Cecil Phillips, another Kory manager, is that in late February or early March two men passed out handbills in front of his store. It is a

reasonable inference, and I draw it, that the handbills were the same as that set forth earlier in this report. Phillips asked the men why they were handbilling. They left without asking him to stop handling Servette merchandise and he has not done so.

The testimony of Harley Salts, a Kory manager, is that on February 25, five men, identifying themselves as striking employees of Servette, told him of the dispute with Servette and asked him to remove Servette products from the shelves. Salts said that he would ask advice from his supervisor. The men passed out handbills that afternoon. The same five men on March 5 and March 12 passed out handbills to customers at the market. Salts did not stop dealing with Servette.

The testimony of Frank Franchino, a Kory manager, is that on March 8, agents of the Respondent passed out the described handbill to his customers. When he asked them to leave they replied that they would stop handbilling if he would quit handling Servette merchandise. Franchino continued to do business with Servette.

The testimony of Larry Drum, a Kory manager, is that agents of the Respondent passed out the described handbills to his customers within the time period indicated.

The testimony of the several market managers is undisputed; the Respondent does not deny that the described incidents took place; I credit the testimony summarized above.

Some of the markets mentioned buy Good Season Salad Dressing and Old London Products from a supplier other than Servette.

The first question for consideration is whether by these requests of the various managers the Respondent was inducing or encouraging any individual to strike or to refuse, in the course of his employment, to perform services for his employer with an object of forcing or requiring the markets to cease doing business with Servette. Decision turns upon the interpretation given the phrase "any individual" in the context of Section 8(b)(4)(i)(B) of the Act. This matter has been the subject of a number of intermediate reports by various trial examiners and of a U. S. District Court decision[2] by Judge Wyzanski in Massachusetts. The Board has not yet decided the point. I have considered this matter before (Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Peyton Packing Company, Inc., case No. 33-CC-66, Intermediate Report issued May 23, 1960). I am of the opinion now as then that "any individual" does not include any of the market managers who were approached by Respondent's agents in this case. No wiser now than then, I adopt and set forth in the following paragraphs that portion of the earlier Report which deals with that question.

The section of the Act referred to appears in identical language in the bill known as S. 748 introduced by Senator Goldwater in late January, 1959, then sometimes referred to as the "Administration Bill." On the appearance of Secretary of Labor Mitchell before a Senate Subcommittee on February 4, Senator Kennedy asked the Secretary, "Would it be a violation of . . . your bill if the business agent of the Clothing Workers

[2]Alpert v. Excavating etc. Union, 46 LRRM 2319.

Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?" Secretary Mitchell answered, "We don't think it would be, Senator." Senator Kennedy persisted, "Now supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?" The Secretary replied, "Request him not to buy? No."

Following this appearance, Secretary Mitchell submitted answers to certain questions which had been raised in the course of his testimony in a letter to Senator Kennedy. In reference to the section of the Act of interest here, the Secretary wrote, "This is intended to reach secondary activity which is directed at a single employee and not primary activity. It is not intended to include any person acting as an agent of an employer, such as supervisory or managerial personnel." In the same communication the Secretary said, "a mere request of an employer or his agent would not be a violation of section [8(b)(4)(i)(B)] unless, under all the circumstances, it is found as a matter of fact that the request is accompanied by an express or implied threat of reprisal or force." Then speaking to a postulated case, the Secretary wrote "Although the superintendent is employed by the school board, it is assumed that he is a supervisor, in which case only the 'threat,' 'coercion,' and 'restraint' provision of the proposed section 8(b)(4)(ii), and not the 'inducement' or 'encouragement' provision of the proposed section 8(b)(4)-(i), is applicable to him, as it is the intent of the pro-

posed bill that only section 8(b)(4)(ii), and not section 8(b)(4)(i), is to apply to employers (in the generic sense) and to their agents, such as supervisors."

During the debate in the Senate on April 17, 1959, Senator Humphrey suggested that Section 8(b)(4)(i) posed a dilemma in that it appeared to forbid a labor organization to appeal to a supervisor to decline to accept a shipment from a struck employer. Senator Humphrey observed "to prohibit the union from approaching [supervisors] would be to cut off the union from its normal channels of communication. It would be a mockery to say that the union is free to persuade a neutral employer to assist it, but to deny the union access to the employer's supervisory and managerial staff." On April 21 following, Senator Goldwater, saying that he desired to allay some of the fears expressed by his colleagues, commented that 8(b)(4)(i) was intended to reach inducements directed at a single employee but made no mention of the supervisor problem.

On July 27, 1959, speaking of H. R. 8400 which contained the identical provision here for interpretation, Congressman Griffin commented that the law as it then existed did not provide a penalty against inducement and encouragement of farm laborers, railway workers and supervisors to engage in secondary boycotts. The amendment as finally adopted would, Congressman Griffin said, correct this situation by changing "employees" to "any individual employed by any person." On August 11, speaking in support of the change in Section 8(b)(4), Congressman Rhodes said, "Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may

now without penalty induce them to engage in secondary boycotts. The Landrum-Griffin bill corrects this by changing the word 'employees' . . . to 'any individual employed by any person.'"

It is the obvious scheme of the Act, as recently amended, to permit a labor organization to seek by means of persuasion the cooperation of a secondary employer in aid of a primary labor dispute while forbidding the use of threats, restraints and coercion upon that employer to bring about the same result. It is also clear that a union may not use such persuasion directed to "any individual" in an employment relation with the secondary employer to induce or encourage "any individual" to strike or refuse to perform services in aid of a forbidden objective. As "any individual" excepting those who are sole proprietors or partners, is commonly employed by a "person," a literal reading of 8(b)(4)(i) would appear to forbid a union, by means of persuasion even though short of threats, coercion or restraint, to induce or encourage the president of a corporation to refuse to perform services for his corporate employer with an object of forcing or requiring the corporation to cease doing business with any other person. Such an interpretation of Section 8(b)(4)(i) would sharply limit the area in which (4)(ii) would find application. If a union may not ask the employee agent of a person whose business is in commerce to cease doing business with another person without violating the Act, then except as to sole proprietorships and partnerships, (4)(ii) is surplusage. Furthermore, a disparity would exist in that a union could use its arts of persuasion (always short of threats, coercion, or restraint) to the utmost

when dealing with a proprietor or a partner but be forbidden to use the same devices if the "person" exists in corporate form. Considering Section 8(b)(4) in its entirety and the practice by labor organizations, which according to legislative history, led to its adoption, I am convinced that a literal reading of 8(b)(4)(i) in the situation of this case would not accomplish the legislative objective. I believe that the interpretations given by Secretary Mitchell, Senator Humphrey, Congressman Griffin and Congressman Rhodes are not necessarily inconsistent. Viewing the section as a whole, the varying constructions may reasonably be explained in that they probably postulated different fact stiuations. Although not called upon here to decide, it seems not unlikely that a labor organization in an effort to persuade an employer to cease doing business with some other person might violate Section 8(b)(4)(i) if it was thus inducing or encouraging a managerial employee to refuse to perform services for his employer. The answer to this must be reached by considering whether the managerial individual is being induced or encouraged to do something against the interest of his employer rather than the contrary. Inducement or encouragement to bring about a strike of supervisory or management personnel is inimical to the secondary employer's interest and, given the forbidden objective, may well constitute a violation of Section 8(b)(4)(i), but that is not the factual setting of this controversy.

The managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling. This, a policy decision, was one for them

to make. The evidence is persuasive that the same authority was vested in the managers of Kory. Some of them ignored the handbilling and continued to use Servette products. Others removed the Servette merchandise or diminished the volume of business done with Servette. None of these managers, I find, was in any respect refusing to perform services for his respective employer. Each, as he was empowered to do, decided what course of action would best solve the dilemma with which he was faced. Respondent's object under the facts here must have been to induce the various store managers to cease doing business with Servette by holding out the prospect that failure to do so would result in diminished trade. I do not understand how in reacting to this pressure the store managers were in any respect depriving their employers of their services in the slightest degree. In no genuine sense was the Respondent inducing or encouraging the managers as individuals to take any action. The inducement and encouragement was directed rather to the business entities. The varying reactions of the managers were reactions to the effect or possible effect of handbilling upon the businesses they managed. I find that no store manager was induced or encouraged to refuse in any manner to perform any services for his employer.

Because of the circumstance that not all of the markets purchased all of the four items listed in the handbill from Servette, it is contended by the General Counsel that the handbilling is to that extent and in that par-

ticular untruthful. It is the fact that all of the stores where the handbilling took place or where such action was threatened did business with Servette and purchased from the organization at least one of the items listed on the handbill. It is also the fact that all of the listed items were distributed by Servette. I find no misrepresentation to exist in the wording of the handbill.

Conclusions of Law

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act;

2. Servette, Kory, McDaniels and Daylight are persons within the meaning of Section 2(1) and Section 8(b)(4) of the Act and each is engaged in commerce within the meaning of Section 2(6) and 7 of the Act;

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) or (ii) of the Act.

It is hereby recommended that the complaint be dismissed in its entirety.

Dated: November 9, 1960.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT OF TRIAL EXAMINER

Comes now Paul D. Cummings, Counsel for and on behalf of the General Counsel of the National Labor Relations Board, and pursuant to Section 102.46 of the Rules and Regulations of the Board, Series 8, respectfully files these his Exceptions to the Intermediate Report and Recommended Order of the Trial Examiner in the above-entitled matter, in the following particulars:

To the Findings of the Trial Examiner—

Page 2, Lines 4-9, Exception No. 1. That in the period from February 3 through March 10, the Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of retail markets stocking products distributed by Servette by encouraging such markets to cease doing business with Servette. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

Page 4, Lines 3-5, Exception No. 2. That "any individual" does not include any of the market managers who were approached by Respondent's agents in this case.

Page 5, Lines 49-53, Exception No. 3. That the managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the fact of threatened or actual handbilling. This, a policy decision, was one for them to make. The evidence is persuasive that the same authority was vested in the managers of Kory.

Page 5, Lines 55-58, Exception No. 4. That none of these managers was in any respect refusing to perform services for his respective employer. Each, as he was empowered to do, decided what course of action would best solve the dilemma with which he was faced.

Page 6, Lines 1-3, Exception No. 5. That I do not understand how in reacting to this pressure the store managers were in any respect depriving their employers of their services in the slightest degree.

Page 6, Lines 3-4, Exception No. 6. That in no genuine sense was the Respondent inducing or encouraging the managers as individuals to take any action.

Page 6, Lines 4-5, Exception No. 7. That the inducement and encouragement was directed rather to the business entities.

Page 6, Lines 7-8, Exception No. 8. That I find that no store manager was induced or encouraged to refuse in any manner to perform any services for his employer.

Page 6, Lines 10-13, Exception No. 9. That because of the circumstance that not all of the markets purchased all of the four items listed in the handbill from Servette, it is contended by the General Counsel that the handbilling is to that extent and in that particular untruthful.

Page 6, Lines 17-18, Exception No. 10. That I find no misrepresentation to exist in the wording of the handbill.

To the Conclusions of Law of the Trial Examiner—

Page 6, Lines 29-30, Exception No. 11. That the Respondent has not engaged in unfair labor practices

within the meaning of Section 8(b)(4)(i) or (ii) of the Act.

To the Recommendation of the Trial Examiner—

Page 6, Lines 32-33, Exception No. 12. That it is hereby recommended that the complaint be dismissed in its entirety.

To the Failure of the Trial Examiner to Make the Following Findings—

Exception No. 13. That in the period from February 3 through March 10, Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of managers of retail markets stocking products distributed by Servette by inducing and encouraging such managers to engage in a refusal in the course of their employment to handle products from Servette normally sold by the markets or to perform their usual services of buying Servette products and selling Servette products to their customers. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

Exception No. 14. That the markets managed by Kenneth Kennish, Cecil Phillips, Harley Salts and Larry G. Drum buy Good Season Salad Dressing and Old London Products from Certified Grocers of Southern California and these same markets do not buy these products from Servette.

Exception No. 15. That the first question for consideration is whether by these requests to the various managers the Respondent was inducing or encouraging any individual to strike or to refuse in the course of his employment to use or otherwise handle Servette

products normally bought and sold by his employer or to perform the normal service of buying and selling Servette products to customers of his employer.

Exception No. 16. That the managers of McDaniels Markets were not authorized by their superiors to decide as best they could whether to continue doing business with Servette in the face of threatened or actual handbilling until the policy decision of what to do about the handbilling was made by their superiors, and passed on to them at a meeting of managers by higher officials of the Company.

Exception No. 17. That the evidence is persuasive that the authority to decide what to do in the face of threatened or actual handbilling rested with higher officials than the managers in the Kory Markets, rather than with the managers themselves.

Exception No. 18. That the Respondent induced and encouraged the managers of the markets to engage in a refusal in the course of their employment to handle the products of Servette sold in their markets and in a refusal to perform the service of selling Servette products.

Exception No. 19. That the Respondent's object under the facts here was to induce the various store managers to cease doing business with Servette by holding out the prospect that failure to do so would result in diminished trade.

Exception No. 20. That the Respondent induced and encouraged the managers as individuals to take action.

Exception No. 21. That the store managers were induced or encouraged to refuse to perform services and to handle products for their employers.

Exception No. 22. That because the handbill listed four items as coming from Servette and this handbill was distributed in front of stores where in fact only two of the items listed came from Servette, and the other two products came from Certified Grocers of Southern California, the handbill is to that extent, and in that particular, untruthful.

Exception No. 23. That misrepresentation exists in the wording of the handbill where said handbill was distributed in front of markets that sold products listed in the handbill as all coming from Servette when in fact at least half the named products came from an entirely different distributor, i.e., the Certified Grocers of Southern California.

Exception No. 24. That the five men who approached Harley Salts, a Kory manager, on February 25 and identified themselves as striking employees of Servette were acting as agents of the Respondent in furtherance of its program to enlist the aid of market managers in its dispute with Servette by telling Manager Salts of the Respondent's dispute with Servette in asking him to remove Servette products and in passing out handbills to Kory customers on February 25, March 5 and March 12.

Exception No. 25. That the Respondent, by inducing and encouraging the managers of the markets to engage in a refusal in the course of their employment to use or otherwise handle Servette products or to perform the service of buying and selling Servette products with an object of forcing or requiring the markets to cease using, selling, handling, transporting or otherwise dealing in the products of Servette or to cease

doing business with Servette, violated Section 8(b)(4)(i)(ii)(B) of the Act.

Exception No. 26. That the Respondent, by passing out false handbills threatened, coerced and restrained the markets with an object of forcing or requiring the markets to cease using, selling, handling, transporting or otherwise dealing in the products of Servette, and to cease doing business with Servette in violation of 8(b)(4)(ii)(B) of the Act.

Exception No. 27. That the Respondent violated Sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act.

To the Failure of the Trial Examiner to Recommend—

Exception No. 28. That the Respondent shall cease and desist distributing to the customers of Kory, McDaniels and Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, handbills containing false information.

Exception No. 29. That the Respondent shall cease and desist inducing or encouraging any individual employed by Kory, McDaniels or Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, to engage in a refusal in the course of his employment to use, handle products distributed by Servette, Inc., or to perform any services where an object thereof is forcing or requiring Kory, McDaniels or Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting or otherwise dealing in the products of Servette, Inc., or to cease doing business with Servette, Inc.

Exception No. 30. That the Respondent post and maintain appropriate notices.

Respectfully submitted,

/s/ PAUL D. CUMMINGS
Counsel for the General Counsel,
National Labor Relations Board.

Dated at Los Angeles, California,
this 30th day of November 1960.

United States of America
Before the National Labor Relations Board.

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

DECISION AND ORDER

On November 9, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent did not engage in any unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board[1] has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report attached hereto, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the Respondent sought to persuade not to do business with Servette were not "individuals" as that term is used in Section 8(b)(4)(i)-(B). We do so, however, only for the reasons set forth in the Carolina Lumber Company[2] and Minneapolis House Furnishing Company[3] cases. We therefore find it unnecessary to consider, and do not adopt, that portion of the Trial Examiner's opinion concerning the possible effect on a labor organization's liability under Section 8(b)(4)(i)(B) of its inducement or encourage-

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[1]Pursuant to the provision of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

[2]Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company), 130 NLRB No. 148.

[3]Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company), 132 NLRB No. 2.

ment of supervisory or management personnel to engage in a strike or other withholding of services.

We also agree, on the basis of our recent Lohman Sales Company[4] decision, that the Rsepondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4).

Order

It is ordered that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. October 30, 1961.

(Seal)

BOYD LEEDOM, Member
JOHN H. FANNING, Member,
GERALD A. BROWN, Member,
National Labor Relations Board.

Philip Ray Rodgers, Member, Dissenting:

As I pointed out in my dissenting opinion in Lohman Sales, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.

[4]International Brotherhood of Teamsters, Local 537 (Lohman Sales Company), 132 NLRB No. 67.

Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities, constitute violations of Section 8(b)(4)(ii)(B) of the Act.

Moreover, were I to reach the question of the truth or falsity of the handbilling itself, I would find the handbilling to be unlawful, at least with respect to the Kory and McDaniels Markets, in that its purpose was not to truthfully advise the public.[5]

The facts disclose that in these instances the Respondent's handbills contained false information as to a material fact which, in my opinion, could only serve to mislead the public and result in injury to another neutral employer. In pertinent part, the handbills read:

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[5]The second proviso in Section 8(b)(4) states:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. (Emphasis added.)

[The Respondent] urgently requests that you do not buy the following products distributed by Servette, Inc.

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

Servette admittedly stocks and distributes all of these products. However, certain of the retail stores, namely McDaniel Market and one of the Kory Markets, purchased certain of these materials not from Servette but from Certified Grocers of Southern California. The latter concern is, like Servette, a distributor of grocery items; but Certified Grocers is, unlike Servette, a neutral employer not involved in the Respondent's dispute.

I cannot read the proviso in Section 8(b)(4) as a license for such inaccurate and misleading handbilling with respect to neutral employers.

October 30, 1961.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

[Title of Board and Cause.]

ORDER CORRECTING DECISION AND ORDER

On October 30, 1961, the Board issued a Decision and Order[1] in the above-entitled proceeding in which an inadvertent error appeared.

It is hereby ordered that the aforesaid Decision and Order be, and it hereby is, corrected as follows:

1. By deleting footnote 1 in its entirety;

2. By changing footnotes 2, 3, 4, and 5 to read 1, 2, 3, and 4, respectively.

It is further ordered that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 2, 1961.

By direction of the Board:

HOWARD W. KLEEB,
Associate Executive Secretary.

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[1] 133 NLRB No. 152.

United States Court of Appeals
For the Ninth Circuit

SERVETTE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board —Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 21-CC-359. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster, on August 8, 1960, together with all exhibits introduced in evidence at the hearing.

2. Copy of Intermediate Report and Recommended Order issued by Trial Examiner Wallace E. Royster on November 9, 1960.

3. Copy of General Counsel's exceptions to the Intermediate Report and Recommended Order received December 1, 1960.

4. Copy of Decision and Order issued by the National Labor Relations Board on October 30, 1961.

5. Copy of Board's Order correcting Decision and Order dated November 2, 1961.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 19th day of January, 1962.

[Seal]

/s/ OGDEN W. FIELDS,
Executive Secretary,
National Labor Relations Board.

[Endorsed]: No. 17678. United States Court of Appeals for the Ninth Circuit. Servette, Inc., Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition to Review an Order of the National Labor Relations Board.

Filed: January 23, 1962.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 17678

SERVETTE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER DISMISSING COMPLAINT BY THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Court of Appeals, for the Ninth Circuit:

The National Labor Relations Board, in Case No. 21-CC-359 (Wholesale Delivery Drivers & Salesmen's Union, Local No. 848 and Servette, Inc.) after proceedings had before said Board in said matter dismissed the complaint therein (charging unfair labor practice) in its entirety on October 30, 1961.

I

Petitioner is engaged in business in the State of California within this judicial circuit where the alleged unfair labor practices set forth in the complaint occurred. Petitioner is a person aggrieved by the final order of the Board and the alleged unfair labor practices directly injured and were solely aimed at petitioner. This court, therefore, has jurisdiction of this petition by virtue of Section 10(f) of the National Labor Relations Act, as amended.

II

In support of this petition, the petitioner respectfully alleges:

1. Contrary to the respondent's findings of fact and conclusions of law as set forth in its Decision and Order, there is substantial evidence set forth in the record that the Wholesale Delivery Drivers and Salesmen Union, Local No. 848, engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(b) of the National Labor Relations Act, as amended.

2. The refusal of the respondent to find as conclusions of law in accordance with the Charge of the General Counsel of the National Labor Relations Board was in violation of the Act, contrary to law, without substantial evidence to support such action and against the evidence set forth in the record.

3. The respondent's Decision and Order dismissing the complaint in its entirety is contrary to the law, without substantial evidence and against the evidence set forth in the record.

4. The respondent's Decision and Order in dismissing the complaint in its entirety is contrary to the policy of the National Labor Relations Act, as amended.

5. The respondent's Decision and Order in dismissing the complaint in its entirety is an abuse of its administrative discretion.

III

The respondent was in error as to the findings of fact and conclusions of law in the following particulars:

In adopting the Intermediate Report of the Trial Examiner and in failing to adopt and approve the thirty enumerated exceptions to said Intermediate Report as set forth in the "Exceptions to Intermediate Report of Trial Examiner" filed with the Board on November 30, 1960 by the General Counsel of the National Labor Relations Board, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.

Each and all the above findings of fact and conclusions of law made by the respondent in all the mentioned matters wherein the respondent failed to make proper findings and conclusions based upon the record, is and are prejudicial to respondent and constitute substantial error and respondent had no reasonable basis in the record for its specific findings and no justification for its failure to find as above stated.

IV

The respondent's Decision and Order in each and every mentioned specification has no reasonable basis in the record and violates petitioner's rights and privileges to petitioner's detriment.

Wherefore, the petitioner prays this Honorable Court:

1. That it cause Notice of this Petition to be served upon respondent;

2. That respondent's Decision, Findings and Order be, in each and all respects, annulled and set aside;

3. That this Court remand this matter to the Board with instructions to find and rule in accordance with the evidence set forth in the record and the exceptions set forth in this petition; and

4. That petitioner shall have such other and further relief as may be just and proper in the premises.

Dated: 13 December, 1961.

HILL, FARRER & BURRILL,
CARL M. GOULD,
/s/ By STANLEY E. TOBIN,
Attorneys for Petitioner,
Servette, Inc.

[Exhibit A—Copy of Exceptions to Intermediate Report.]

[Endorsed]; Filed Dec. 14, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151 et seq.), files this Answer to the petition to review and set aside its order issued October 30, 1961.

1. The Board admits the allegation of jurisdiction in Section I of the petition to review.

2. With respect to the allegations contained in the other sections of the petition to review, the Board prays

reference to the entire certified record for a full and exact statement of the proceedings before the Board, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in the petition to review.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper.

5. Pursuant to Sections 10(e) and (f) of the Act, the Board is certifying and filing with this Court the entire certified record consisting of transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board.

6. Wherefore, the Board prays that the Court enter a decree denying the petition to review.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 19th day of January, 1962.

[Endorsed]: Filed Jan. 23, 1962. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

RESPONDENT'S STATEMENT OF POINTS

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, respondent herein, and pursuant to Rule 17(6) of the rules of this Court, files this statement of points upon which it intends to rely.

I.

The Board properly concluded that none of the store managers are an "individual employed by any person" within the meaning of Section 8(b)(4)(i) of the National Labor Relations Act and that the Union's activities therefore did not violate Section 8(b)(4)(i)(B) of the National Labor Relations Act.

II.

The Board properly concluded that the Union's handbilling activities did not violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board

Dated at Washington, D. C. this 19th day of January, 1962.

[Endorsed]: Filed Jan. 23, 1962. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS RELIED UPON

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Servette, Inc., Petitioner herein, pursuant to the Rules of this Court, files this Statement of Points upon which it intends to rely in the above entitled proceeding.

1. The Respondent, the National Labor Relations Board, wrongfully failed to find that the Wholesale Delivery Drivers and Salesmen Union, Local No. 848, engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(3) of the Act.

2. The Respondent's Decision and Order in dismissing its complaint in its entirety is contrary to the law, without substantial evidence and against the evidence set forth in the record.

3. The Respondent's Decision and Order in dismissing the complaint in its entirety is contrary to the policy of the Act.

4. The Respondent's Decision and Order in dismissing the complaint in its entirety is an abuse of its administrative discretion.

HILL, FARRER & BURRILL and
CARL M. GOULD
/s/ By STANLEY E. TOBIN
Attorneys for Petitioner
Servette, Inc.

Dated at Los Angeles, California this 28th day of February, 1962.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 1, 1962. Frank H. Schmid, Clerk.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-359

In the Matter of:

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848,

and

SERVETTE, INC.

TRANSCRIPT OF PROCEEDINGS

Hearing Room No. 1, 849 South Broadway, Los Angeles, California, Monday, August 8, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Wallace E. Royster, Esq., Trial Examiner.

Appearances: Paul D. Cummings, Esq., 849 South Broadway, Los Angeles, California, appearing on behalf of the National Labor Relations Board. Charles K. Hackler, Esq. 1621 West 9th Street, Los Angeles 15, California, appearing on behalf of Wholesale De-

livery Drivers & Salesmen's Union, Local No. 848, the Respondent. [1]*

* * * * *

Proceedings

Trial Examiner: On the record.

This is a formal hearing before National Labor Relations Board of Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, Case No. 21-CC-359.

I am Wallace E. Royster, the Trial Examiner designated to make findings of fact, conclusions of law, and recommendations to the Board in respect to the issues.

Will you please state your appearances for the record?

Mr. Cummings: Paul D. Cummings, counsel for the General Counsel.

Mr. Hackler: Charles K. Hackler, counsel for the respondent union.

Trial Examiner: Your office address?

Mr. Hackler: 1621 West 9th Street, L.A. 15.

Trial Examiner: The reporter on my left makes the only transcript of these proceedings, which the Board will subsequently certify.

Proceed, Mr. Cummings.

Mr. Cummings: Thank you, sir.

I wish to have identified as a General Counsel's formal Exhibit 1-A to 1-L, the following documents. Exhibit 1-A, Original Charge, dated March 10, 1960.

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*Page numbers appearing at top of page of Original Transcript of Record.

1-B, Affidavit of Service of 1-A, dated March 10, 1960.

1-C, Original Complaint and Notice of Hearing herein, [3] dated July 5, 1960.

1-D, Affidavit of Service of 1-C, dated July 5, 1960.

1-E, Answer of Respondent, dated July 12, 1960.

1-F, Motion to Make More Definite and Certain, dated July 12, 1960.

1-G, Answer of Counsel for the General Counsel to Respondent's Motion to Make More Definite and Certain, dated July 20, 1960.

1-H, Order referring Motion to Make More Definite and Certain to Associate Chief Trial Examiner for ruling, dated July 20, 1960.

Exhibit I, Affidavit of Service of 1-H, dated July 20, 1960.

1-J, Ruling on Motion [I [f]], dated July 21, 1960.

1-K, Affidavit of Service of 1-J, dated July 21, 1960.

1-L, Index and Description of Formal Documents.

I show these to the respondent's counsel.

Mr. Hackler: I saw them.

(Thereupon the documents above referred to were marked General Counsel's Nos. 1-A through 1-L, respectively for identification.)

Mr. Cummings: I now offer General Counsel's Exhibit 1-A through 1-L into evidence.

Mr. Hackler: No objection.

Trial Examiner: G. C. Exhibit 1-A through 1-L is received. [4]

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-L for identification, were received in evidence.)

Mr. Cummings: I wish at this time to request permission to make a motion to amend Paragraph 9 of the Complaint to change the wording in lines 4 and 5 from "Kory and other retail food markets," to "Kory, McDaniels and other retail food markets."

Trial Examiner: Is there objection?

Mr. Hackler: Mr. Trial Examiner, no, the answer to our motion for bill of particulars limited the matter to Kory, but counsel, in an off-the-record discussion, has reached agreement with me that he might add McDaniels Market, but with the understanding that the remainder of the other retail food markets—that there will be no evidence with respect to any so-called other retail markets.

Mr. Cummings: That is correct, sir.

Mr. Hackler: With that understanding I have no objection.

Trial Examiner: The Complaint is amended as moved.

Mr. Cummings: At the present time I wish to have identified as General Counsel's Exhibit No. 2 this paper which purports to be a handbill, and I offer this stipulation: It is stipulated that G. C. Exhibit No. 2, with the wording contained thereon, is the handbill and only handbill referred to in the Complaint and Respondent's Answer and also in the [5] evidence that is to follow.

Mr. Hackler: So Stipulated.

Trial Examiner: Very well. Noted.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Mr. Cummings: I move at this time that G. C. Exhibit No. 2 be received into evidence.

Trial Examiner: Hearing no objection, it is received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received into evidence.)

Mr. Cummings: In an off-the-record discussion with counsel it has been agreed that I read into evidence certain affidavits from people who have been interviewed by the General Counsel's counsel and that the information contained therein will be stipulated to as being the statements that the people would have made had they been called and sworn in as witnesses.

Mr. Hackler: So stipulated. If they'd have been called and sworn as a witness they would testify substantially as you are about to read on both direct and cross-examination. So stipulated.

Trial Examiner: Very well.

Mr. Cummings: The first one is an affidavit obtained from Kenneth Harold Kennish. [6]

Mr. Hackler: Will you spell that, please?

Mr. Cummings: First name, K-e-n-n-e-t-h. Harold. Kennish, K-e-n-n-i-s-h.

It reads as follows:

"I, Kenneth Kennish, depose and say: I have been the manager of McDaniels Market No. 14 at 6135 Atlantic Boulevard in Maywood, California,

telephone Ludlow 7-3168, for 8 months. Some time the end of winter or early spring of 1960, 3 men came in the store. They introduced themselves as being from the Teamsters. I do not recall their names. They told me they had a labor dispute with Servette and asked me to cooperate with them by not dealing with Servette and by taking Servette merchandise off our shelves. They told me they would pass out handbills to my customers if I did not cooperate. They showed me the handbill. It asked the patrons of my store not to buy the following products delivered by Servette: Brach's Candy, Servette Candy, Good Season Salad Dressing and Old London products. I do not buy Good Season Salad Dressing and Old London products from Servette but from Certified Grocers of Southern California. The men passed out these handbills to my customers outside the store. They were standing right close to the door that leads from our parking lot. I kept doing business with Servette, Inc. I have read the above statement and I swear it is true." It is signed by Kenneth Harold Kennish. [7]

On the margin of this affidavit is also stated "Some men also came approximately a week later and handed out handbills to my customers."

Trial Examiner: What is the date of signature on that?

Mr. Cummings: This is subscribed and sworn to on July 26, 1960 at Los Angeles, California.

Mr. Hackler: So stipulated, counsel, and I might state that the men denominated in the affidavit of Mr.

Kennish as "3 union men" were each and all agents of the respondennt union and that the handbill which was exhibited to him is the handbill, a copy of which is in evidence as General Counsel's Exhibit 2.

Trial Examiner: Is it agreed between you also that in so far as any incident that may be mentioned in any of the affidavits that are to be read and as to the one that has been read, that these incidents took place within a period not exceeding 6 months before the filing of the charge?

Mr. Hackler: Yes.

Mr. Cummings: I will stipulate to that and also stipulate to the stipulation stated by Mr. Hackler just previously.

Trial Examiner: All right.

Mr. Hackler: In fact, referring to the Complaint. I would stipulate that they took place between February 3, 1960, and the date of the filing of the charge on March 10,—

Mr. Cummings: I will so stipulate. [8]

Trial Examiner: Very well.

Mr. Hackler: —which is a very limited period of time.

Mr. Cummings: The statement I am about to read has not been signed by Mr. Tessler, the man who just left, due to scruples as stated to me about signing documents.

Mr. Hackler: I will stipulate that if called and sworn as a witness he would go down the line on his unsworn statement.

Mr. Cummings: Thank you, sir.

Mr. Hackler: Although he might affirm it; I don't know.

Mr. Cummings: I might say that he did read the statement and he did assure me that it was true.

Mr. Hackler: I believe it to be true also.

Trial Examiner: All right. Go ahead.

Mr. Cummings: "I, Henry Tessler, depose and say: I am the manager of Daylight Market No. 3, 3800 West Santa Barbara, Los Angeles, California. I have been the manager of this store for about one year.

"I recall that in approximately the last part of February or the first part of March, 1960, 3 or 4 men came into the store. They said "Hello, Henry," and introduced themselves as being from the Teamsters. I recognized one or two of them as being drivers for Servette. They spoke to me about the labor dispute they had with Servette and asked me to cooperate with them by not handling Sevette products. They told me they were [9] passing out handbills to the customers of those markets that were not cooperating with them. I told them that I only handled one or two products distributed by Servette and that it would not do them any good to handbill my customers. I told them I did not want to get in the middle. They did not handbill. They left the store and I have not seen them since. I did not see the handbill. I have read the above statement and I swear it is true to the best of my knowledge and belief."

As I say, he did not sign it, but he affirmed it in my presence.

Mr. Hackler: So stipulated that if called and sworn as a witness he would so testify. It may be considered as if he had done so.

Trial Examiner: All right. Fine.

Mr. Cummings: The next one: "I am the manager at Kory's Market No. 6, 120 West Anaheim Boulevard, Wilmington, Spruce 51681.

"On approximately Thursday, 2/25/60, two representatives from the Teamsters No. 848 came into my store. They identified themselves as being from the union, giving me their cards.

"Jerry ....., one of them explained the labor situation at Servette, Inc. He's Business Agent for the Teamsters. He showed me a handbill and said we are going to pass these out to your customers. If you do not handle Servette, Inc., merchandise we won't hand them out. I said that I would have to [10] check with the main office about getting Servette merchandise out of the store.

They went out. Two passed out handbills in the parking lot and two at the front entrance to customers from 2:00 to 6:30 p.m.

The next week I refused to let the Servette driver stock the shelves. I told him to have Gaudio call. When Gaudio called I told him I wouldn't take an order because they would pass out leaflets if I got service from Servette.

The following week four men came in, two Servette drivers and two union men from 848. They were different men this time.

One of them said that 3 or 4 chains were cooperating with them on keeping Servette products out of their stores. If you will cooperate we will not pass out any handbills. They asked me 'Have you accepted any Servette merchandise?' I said

'No.' They could see the Servette racks were empty. The goods had all been sold and I had not allowed replacement.

They said 'We won't hit this store but Kory stores in the city are going to be hit real bad.'

They also told me that two or three Kory stores had refused Servette goods that same week. I called two stores. One was number 7 in the Valley and they told me they got serviced.

Jerry ....., 848 business representative came in [11] with Rob ..... the regular driver. It was a different Jerry than the first one. They appraoached me out front. They could see the racks still empty.

I do not recall the conversation but it pertained to the same situation regarding Servette."

I offer the stipulation that if Pete Givigliano were called he would so testify.

Mr. Hackler: So stipulated.

Mr. Cummings: I would also offer the stipulation that the Gaudio mentioned in this unsworn but adopted statement is the A supervisor at Servette.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that the words "hit hard" and "hit" in the affidavit refer only to the passing out of leaflets to customers of various markets.

Mr. Hackler: So stipulated. Now, what was the name of that witness?

Mr. Cummings: Givigliano.

Mr. Hackler: How do you spell that?

Mr. Cummings: G-i-v-i-g-l-i-a-n-o. Pete.

Mr. Hackler: Counsel?

Mr. Cummings: Yes, sir.

Mr. Hackler: From the affidavit, the statement, it appears that a week following the first visit that the witness called the man at Servette and told him about not taking new [12] orders. Then there was a further visit from the Union men. Do you have any information as to the timing of those two matters? Did the Union people appear after he had ceased dealing with Servette or before, or was it just as it is in the affidavit?

Mr. Cummings: It is my information that it is just as it appeared in the affidavit.

Mr. Hackler: It was at least some time after he had discontinued dealing with Servette that the Union people came back and in effect checked up then?

Mr. Cummings: Yes.

Mr. Hackler: All right. Thank you.

Mr. Cummings: The next is an affidavit: "I, Cecil B. Phillips, depose and say:

"I am the manager of Kory's Market No. 5 at 2250 Pico Boulevard, Los Angeles, California, DU 40570.

I have been the manager here for 3 years.

About the end of February or early March 1960, two men passed out handbills in front of my store. The handbill mentioned Brach's Candy. I asked them why they were handing out the handbills to my customers when we did not have any dispute with them. They went away. They did not ask me to stop handling Servette products. I still do business with Servette. At the

time of the handbilling we did not take Old London products or Good Season Salad Dressing from Servette [13] but from Certified Grocers.

I have read the above statement and I swear that it is true." C. B. Phillips, signature; "Subscribed and sworn to before me this date July 25, 1960, at Los Angeles, California."

Mr. Hackler: So stipulated. May it further be stipulated—the witness says that certain of the products named in the handbill that he did not have delivered by Servette, but can we have a stipulation that Brach's Candy he did receive from Servette? The inference is there. He excludes Servette products as not being received from Servette. So that we are clear, does that mean that Brach's Candy that he refers to—and it is also in the leaflet—that he did receive from Servette?

Mr. Cummings: I don't—quite frankly I don't know whether he received those other two or not, but since we can't say that he didn't receive those from Servette I think the effect would be the same.

Trial Examiner: You are left with whatever the affidavit says, then.

Mr. Hackler: All right. The affidavit is asylum, so we make whatever assumptions we want, I guess.

Mr. Cummings: I offer the stipulation that if Mr. Cecil B. Phillips were called he would have so testified.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that were [14] called he would have so testified.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that

were Mr. Cecil B. Phillips called he could identify General Counsel's Exhibit 2 as the leaflet passed out in front of his store.

Mr. Hackler: So stipulated.

Mr. Cummings: Now, the following that I am about to read is not a signed statement or an adopted statement, but a memorandum written by myself shortly within minutes after speaking to the manager named therein.

Mr. Hackler: May we be off the record a moment?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: If Sam Gross were called as a witness he would testify substantially as follows: That he is manager of McDaniels Market No. 18; that 3 Teamster representatives came in, including the former Servette driver, and asked him to take Servette merchandise off the shelves. He told them he would have to get permission. They made no threats or promises of any kind. They did not threaten him with handling. He would testify that at a meeting of managers of some kind they were told by company officials to try to get along with both sides and to do as they wished. When the Servette driver then employed by Servette next came in he was told by Gross to [15] let the order go this week unless Gross absolutely needed something.

The next statement, if Maurice Hattem, were called he would testify as follows: That he is manager of McDaniels Market No. 25; that he had one visit from a former driver at Servette and a representative of the

Teamsters Local 848. They requested him not to handle Servette products; told them, "I'll see what I can do." They showed him the handbill referred to as General Counsel's Exhibit No. 2, but they did not say that they would pass it out in front of his store. Hattem told the Servette man then currently employed by Servette "Unless I absolutely need it pass me up." He would also testify that he did not know if the Servette man left anything at that time or if he had been back.

This memo, because it is in substance a memorandum of a very brief conversation that took place between myself and Mr. Hattem, took place on March 16, 1960. I might add that I have been back, of course, to see Mr. Hattem, and several of the facts that I have incorporated in the statement Mr. Hattem would make if he were called were added at a subsequent meeting.

Mr. Hackler: That is still what he would testify to.

Mr. Cummings: That is in essence—as I made the statement that is what he would testify to.

Mr. Hackler: The essence is good enough.

Trial Examiner: That is agreeable to you, Mr. Hackler? [16]

Mr. Hackler: Yes, sir.

Trial Examiner: Very well.

Mr. Cummings: This next is an affidavit from Harley, H-a-r-l-e-y, Salts, S-a-l-t-s.

"I, Harley Salts, depose and say:

I am the manager of Kory's Market No. 1, 4710 South Broadway, Los Angeles, Adams 49854.

On approximately 2/25/60 about 2:00 p.m. 5 men who identified themselves as drivers for Ser-

vette, Inc., on strike came into the store and approached me in the front of the store. I was alone. I did not recognize any of them. They said they were members of Teamsters Local No. 848.

They asked me what I thought of their strike. They explained they were union men and the company was trying to put franchise drivers in and they were out of work as a result. They said 'Well you cooperate with us by taking Servette, Inc., merchandise off the shelves?' I said 'I will check with my supervisor.'

Two were doing the talking. They said 'We'll come back and check. We are going to pass out handbills. Is it all right.' He showed me the handbill. I said 'I would appreciate it if you wouldn't but I can't stop you as long as you do not give them out on company property.' They left and passed out handbills to my customers until approximately 5:00 p.m.

They came back Saturday 3/5/60 and again the following [17] Saturday 3/12/60 and passed out handbills from noon to approximately 5:00 p.m.

The handbill identified 'Old London Products' and 'Good Season Salad Dressing' which I do not buy from Servette but I buy them from Certified Grocers of California.

I did not stop dealing with Servette, Inc.

I have read the above statement and I swear that it is true." Signed Harley Salts.

This was "subscribed and sworn to before me," Paul Cummings, "this date, March 15, 1960, Los Angeles, California."

I offer the stipulation that if Mr. Salts were called he would so testify.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that the handbill referred to in this affidavit is General Counsel's Exhibit No. 2.

Mr. Hackler: So stipulated. May we also have a stipulation that where ever in testimony reference is made to Servette drivers, either alone or in company with Teamster representatives, talking to the managers, and asking them not to handle products, that the Servette drivers referred to there are striking Servette drivers?

Mr. Cummings: I will so stipulate.

Trial Examiner: Very well.

Mr. Hackler: It merges from that affidavit, but not [18] clearly from the others, and in the last two affidavits, however, the manager had occasion to talk to a different Servette driver, namely one who was still working, and had a conversation with him in each instance with respect to buying more products, and that would be a man-striking Servette driver.

Mr. Cummings: Fine. Thank you.

Mr. Hackler: I ask again with respect to this affidavit if you are able to stipulate that Kory's Market No. 1, of which Mr. Salts was the manager, did obtain Brach's Candy and Servette Candy from Servette?

Mr. Cummings: I will stipulate that he did.

Trial Examiner: All right.

Mr. Hackler: Thank you.

Mr. Cummings: Because I know that to be a fact.

The next is an affidavit from Frank Franchino, F-r-a-n-c-h-i-n-o.

"I, Frank Franchino depose and say:

I am the manager of Kory's Market No. 2, 5801 South Vermont, Los Angeles, PL 3-8380.

On approximately 3/8/60 two representatives from the Teamsters were passing out handbills to our customers concerning Servette, Inc., and its products at the rear customer entrance from 2:30 p.m. to 4:30. They passed out hundreds of handbills. I went out to them asked them to leave our property. [19] They moved to the sidewalk. One said 'I see you're the manager.' I had on my badge identifying me. He said 'We'll stop causing you trouble if you quit handling Servette merchandise.' I said that I'd have to look into it. I did nothing about it.

That is all that was said or done that I know of.

I have read the above statement and I swear that it is true. [Frank Franchino]"

Subscribed and sworn to on March 15, 1960.

There is a further memo, dated March 16, 1960, resulting from a telephone call that I had with Mr. Franchino, and it reads as follows:

"Frank Franchino, Kory's No. 2, told me today on the phone that all Kory's Markets including his own buy Good Season Salad Dressing also from Certified Grocers of California."

This "also" I have circled here, this being my own notation. I will stipulate that he made this statement to me at the time. I think the other affidavits made clear that certain Kory's Markets do, in fact, not by Good Season Salad Dressing and Old London Prod-

ucts from Servette as well as from Certified Grocers. Agreed, sir?

Mr. Hackler: Let me see if I understand the stipulation. Touching upon all the Kory's Markets' locations of incidents do I understand that some, but not all of them, obtain Good Season Salad Dressing and Old London Products from Servette [20] and some, but not all of them, obtain those two products from Certified Grocers, another distributor?

Mr. Cummings: Would you read that back please?

(Record read.)

Mr. Hackler: Basically it is some do and some don't.

Mr. Cummings: I will stipulate to that.

Trial Examiner: All right.

Mr. Hackler: Now, counsel, may it be stipulated that as to Servette Candy named in the leaflet and Brach's Candy, that all of the Kory outlets obtain those products, to some degree at least, through delivery by Servette? I might suggest that your affidavits exclude the other products in the context that indicates that the two main ones, that is Brach's Candy and Servette Candy, are received from the concern that the Union had the dispute with.

Mr. Cummings: Yes. That is true, and that was the understanding that I had with the market managers at the time they made the statements to me. I will stipulate to that, yes, sir.

Mr. Hackler: So stipulated.

Trial Examiner: All right.

Mr. Cummings: I offer the stipulation that—

Mr. Hackler: May I just interrupt just one moment?

Mr. Cummings: Yes, Surely.

Mr. Hackler: The same, I take it, is true of the McDaniels Market with respect to Brach's Candy and Servette [21] Candy being received by the McDaniels Market involved by Servette delivery. I think it must be true because Paragraph 9 of the Complaint, touching upon the falsity of the leaflets, refers to them as being false only to the extent of Good Season Salad Dressing and Old London Products, and not the other two.

Mr. Cummings: Yes. I don't think the Complaint goes any further than the products you have just mentioned.

Mr. Hackler: I assume it would go farther, if, in fact, the other two products named were received from some other source.

Mr. Cummings: You are correct in that assumption sir. We will go only on the two products, Old London and Good Season Salad Dressing.

Trial Examiner: All right.

Mr. Hackler: So stipulated.

Mr. Cummings: Off the record, sir?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: I offer the stipulation that if Larry G. Drum, manager of Kory's Market No. 3 at 500 West Florence, Los Angeles, California, were called, he would testify as follows: That he is the manager of Kory's Market No. 3 above mentioned, and that his store buys Old London Products, [22] and Good Season Salad Dressing through Certified Grocers of

Southern California, and that Teamster agents from Local 848 passed out handbills of the type identified in General Counsel's Exhibit No. 2.

Mr. Hackler: I take it that period there would be between the date of the charge and—

Mr. Cummings: Yes. The time element—

Mr. Hackler: —and some date undisclosed.

Mr. Cummings: Are we in agreement that—I think we are in agreement that this handling is all part of the plan and we have previously identified the time.

Mr. Hackler: All right. So stipulated.

Trial Examiner: All right.

Mr. Cummings: I will also add the stipulation that Brach's Candy and Servette Candy, if sold in this particular market,—

Trial Examiner: Came from Servette?

Mr. Cummings: Came from Servette.

Mr. Hackler: So stipulated.

Trial Examiner: O.K.

Mr. Cummings: There is another further stipulation that I would like to add at this time, Mr. Hackler, and that is that all the markets we have identified so far have done, and do do, and were doing at the time we are concerned within this hearing, business with Servette. [23]

Mr. Hackler: Well, the doing of business—that is being factual about it—with the purchasing of Brach's Candy and Servette Candy and in some, but not all instances, the other two products; isn't that what you mean?

Mr. Cummings: Fine. Right. It is limited to that, yes.

Mr. Hackler: I don't like the conclusion "doing business." It might be in the real estate business.

Mr. Cummings: I would like to ask for a short recess to examine my position at this time.

Trial Examiner: All right.

Mr. Hackler: Do you have the information as to the number of markets overall in the Kory chain and we will say in the McDaniel chain and the Daylight Market chain?

Mr. Cummings: No, sir; I have no idea as to the number of markets there are.

Mr. Hackler: May we have a stipulation that each of those 3 concerns which are referred in Paragraph 3 of the Complaint—that is Kory's Markets, Inc.; McDaniels; and Daylight Markets, are retail food market chains operating a substantial number of separate retail chain markets in the greater Los Angeles area.

Mr. Cummings: I will stipulate to that, yes, sir.

Trial Examiner: All right.

Mr. Cummings: I offer the further stipulation that the individual markets that have been identified so far are [24] markets and outlets in the 3 chains mentioned in the Complaint, namely Kory's, McDaniels, and Daylight.

Mr. Hackler: So stipulated. Those are some of the outlets.

Mr. Cummings: Yes, sir. I so stipulate.

Trial Examiner: All right. Now you want a short recess?

Mr. Cummings: I do, sir.

Trial Examiner: All right. We will take one.

(Short recess.)

Trial Examiner: On the record.

Mr. Hackler: It may be stipulated with counsel that where ever, in the course of the stipulated testimony, market managers said that they were dealing with agents of Teamsters' union, that in each and every instance such agents were, in fact, agents of the respondent Teamsters' local union, excluding, however, the instances where the market manager identified some of the people talking to him as being Servette drivers. In each instance where Servette drivers were referred to those persons were not officials or agents of the Union, but members of the Union and on strike as a part of the Union's labor dispute with Servette.

Mr. Cummings: Well, that is a factual conclusion, actually, when we mention—we have agents in 2 aspects; one, the agents as employed by the Teamsters as agents; and the other is the legal conclusion that might be drawn from [25] striking drivers participating in a program fostered by the Teamsters in their conducting of the matter concerned with Servette.

Mr. Hackler: I don't think it makes too much difference, counsel, where Teamster agents are carrying on a conversation with management and 2 or 3 strikers along with them. I simply don't care to stipulate that people on strike are necessarily agents of the Union.

Mr. Cummings: Well, in that case, can we stipulate that the agents—Teamster representatives referred to in the various statements and the affidavits I have read, are agents of Local 848?

Mr. Hackerl: Oh, yes. The agents are agents. There is no question about that.

Mr. Cummings: Well, I will so stipulate.

Trial Examiner: All right.

Mr. Cummings: Now, as to the accompanying drivers.

Mr. Hackler: Let's be clear on one thing. You have got one instance here where 5 strikers hand out leaflets in front of the store and the manager comes out and accosts them and engages them in a conversation. I am not prepared to state that the Union, as a union, is responsible for what those strikers may or may not have said. I don't think we have to reach to the guts of your complaint here, where, as a matter of principle, I am certainly not going to say it because [26] strikers have a way of sometimes carrying the ball in their own fashion.

Trial Examiner: Anyway, you don't make that confession?

Mr. Hackler: No.

Trial Examiner: All right.

Mr. Hackler: I would *also to* stipulate that Paragraph 7 of the Complaint indicates that there was a labor dispute and a strike against Servette, and that has been admitted. I would like to more particularize that by inviting official notice to the proceedings in the case of Servette, Inc., in case No. 21-CA-3869, which complaint has been issued in, and which is awaiting and intermediate report from Trial Examiner Doyle, as background material and showing what the dispute what was over, and it is also affording some explanation of the strikers, where they came from, and when they struck, and that sort of thing.

Mr. Cummings: I will stipulate that there is such a proceeding currently before the Division of Trial Examiners.

Mr. Hackler: I am merely offering it for whatever background value it may have. It may turn out that the Trial Examiner and the Board will feel that it has no background value.

Trial Examiner: I am not going to go through the file in the previous Servette case unless I am told in what respects [27] I should examine it. I suppose that I can take notice of the Complaint, as issued, making certain allegations.

Mr. Hackler: That is as far as I wish to go.

Trial Examiner: Do you object to that?

Mr. Cummings: I have no objection to that.

Trial Examiner: All right.

Mr. Hackler: From my standpoint, very simply, I simply want the record to show that these people are protesting unfair labor practices for what it is worth. At least they are being prosecuted that way. Ultimately whether the case is won or not I suppose remains to be seen. I don't expect the Trial Examiner to go into a lot of details about it.

Trial Examiner: All right.

Mr. Cummings: On the stipulation, just so we understand one another, I offer this stipulation: That the people referred to in the various statements and affidavits that have been previously read into the record that referred to Teamster representatives, that these Teamster representatives are agents of Local 848.

Mr. Hackler: So stipulated. It has already been so stipulated.

Mr. Cummings: I just wanted to make sure we understood one another.

Trial Examiner: All right.

Mr. Cummings: I also want it clear at this time that I [28] make no admissions with regard to the so-called striking Servette drivers in their relationship to the Union.

Mr. Hackler: That is so understood.

Trial Examiner: All right.

Mr. Hackler: I might point out, counsel, that Paragraph 7 of the Complaint has been admitted in the Answer. We admit that we have engaged in a campaign or program to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's strike against Servette, and to promote a boycott by dealers and consumers of such products. That is all admitted. It seems to me it isn't a too highly significant matter in the case.

Mr. Cummings: Further, I offer the stipulation that the requesting by the Teamster representatives of Local 848, together with the striking drivers from Servette, requesting the various market managers above mentioned not to handle Servette products, together with the actual handing out of the handbills by Local 848 agents and former Servette drivers now on strike, was in furtherance of the campaign or program set forth in Paragraph 7 of the Complaint.

Mr. Hackler: Well, I think the evidence speaks for itself in that regard. I don't like these conclusionary stipulations.

Trial Examiner: All right.

Mr. Hackler: You have the evidence of what was said and [29] what was done.

Trial Examiner: Of course you admit in your Answer, if I recall it correctly, that you did leaflet in support of such a program.

Mr. Hackler: Yes, and that we had such a program. Whether the particular instances here would be deemed in furtherance of that particular program or otherwise, I think the facts will speak for themselves.

Mr. Cummings: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: The General Counsel rests.

Mr. Hackler: I have just one witness.

Jerry, will you take the stand?

JERRY FINLEY,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hackler): State your name, please.

A. Jerry Finley, F-i-n-l-e-y.

Q. What is your occupation?

A. I am a Business Agent for the Teamsters' Union Local 848.

Q. I take it you were active, Mr. Finley, in this program involving the dispute with the Servette Company? [30]

A. Yes, sir, I was.

Q. This leaflet, which is G. C. Exhibit 2, I will ask you if that is the only leaflet that was used by the Union in that program?

A. Yes, sir, it was.

(Testimony of Jerry Finley.)

Q. And could you approximate the number of retail chain supermarkets at which this leaflet was distributed during the course of the program?

A. It would be well over 50.

Q. In the greater Los Angeles area?

A. Yes, sir.

Q. And would it be fair to say that the evidence here with respect to McDaniels and Kory's and Daylight were only 3 of the chains at which leafleteering took place? A. Yes, sir.

Q. And did you engage in some of the leafleteering yourself, the physical handing out of the leaflets?

A. Yes, sir, I did.

Q. And were you in general charge of others who were engaged in the same program?

A. Yes, sir, I was.

Q. And uniformally were the leaflets distributed at the customer entrances of the stores?

A. Yes, sir, in all instances.

Q. Now, in addition to the retail supermarkets, was the same [31] leaflet distributed anywhere else in connection with this dispute with Servette?

A. Yes, sir. We distributed these leaflets at Union meetings.

Q. Of about how many unions?

A. Well, over 30 unions, I would say offhand.

Q. Union meetings. You mean meetings of local union members?

A. Yes, sir, and also at District Council meetings such as Carpenters District Council and Joint Council Teamsters meetings.

(Testimony of Jerry Finley.)

Q. Do you know if a facsimile of the leaflet was published in any of the Teamster publications?

A. Yes, sir, it was. [32]

Q. And what publication was that?

A. That was the Teamster—that is the weekly Teamster paper.

Q. That is the Southern California Teamster?

A. Yes, sir.

Q. And that is a publication that is published weekly by the Teamsters' Union in Southern California?

A. Yes, sir, and also, I believe, that it was also published in the U. A. W. Long Beach paper, and also in the Machinists' Lodge out of Santa Monica paper.

Q. Now, did it ever come to your attention during the course of this leafleteering that any drivers or other people refused to make deliveries at the place that was being picketed?

A. No, sir. Never.

Q. Was there ever any contention made to you by any person, either from the stores or the Government or anywhere else, that anybody had ceased working as a result of this program?

A. No, sir. In fact, if any of our drivers would see us passing out leaflets we would certainly tell them to go through and, you know, to certainly deliver to the store.

Q. Was that a part of your instructions to the people? A. Yes, sir.

Q. Is that the way you conducted the picketing?

A. Yes, sir.

(Testimony of Jerry Finley.)

Q. The leafleteering, I should say. [33]

A. Leafleteering.

Mr. Hackler: May I stipulate, Counsel, that the Government has no evidence to offer and makes no contention—let's put it that way—that makes no contention that an effect of this leafleteering program was the inducing of any individual employed by any person other than Servette in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Mr. Cummings: No, sir. I think the facts are the contrary.

Mr. Hackler: The facts you have in evidence?

Mr. Cummings: Yes, sir.

Mr. Hackler: Well, let's put it more simply. There is no contention on your part that truck drivers, for example, seeing the leafleteering, refrained from making their general deliveries to any of these places?

Mr. Cummings: No, sir, we have no evidence to this effect.

Mr. Hackler: No contention that any truck driver refused to pick up or transport goods at any of these establishments?

Mr. Cummings: That is true.

Mr. Hackler: I think that is all.

Trial Examiner: Any questions? [34]

Cross-Examination

Q. (By Mr. Cummings): Mr. Finley, did you pass out leaflets at any of the particular markets mentioned in the evidence so far?

(Testimony of Jerry Finley.)

A. Yes, sir. I am sure I must have. I passed them out all over. I believe I hit one Kory's on Florence and Vermont there. That one. Not Florence and Vermont. I think it would be—anyway, that one on Florence that was named wherever this fellow who was the manager, named there. Just in this slight—just a slight bit that you had on memorandum.

Q. Did you pass them out at the mentioned Wilmington Kory Market?

A. No, sir. I myself did never—I never did pass out a leaflet at Wilmington Kory Market.

Q. Did you contact the manager at that store?

A. Yes, sir, I did.

Q. Mr. Pete Givigliano?

A. Yes, sir, I did.

Q. Was this in furtherance of the campaign to enlist the support of the various markets?

A. Yes, sir, it was.

Q. In your labor dispute with Servette?

A. Yes, sir.

Mr. Cummings: May we go off the record for a moment? [35]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Cummings): Mr. Finley, in the affidavit of Mr. Kenneth Kennish, which has been read into the record by me, he states that the leafleteering took place at his market, which is a McDaniels Market, No. 14, at 6135 Atlantic Boulevard in Maywood, California. Did you pass out leaflets at that market?

A. Yes, sir. Yes, sir, I did.

(Testimony of Jerry Finley.)

Q. And was this also in furtherance of the Local 848's campaign to enlist the markets in support of their strike—

A. Yes, sir.

Q. —in labor dispute with Servette, Inc.?

A. Yes, sir, it was.

Q. Mr. Finley, how many market managers cooperated with you by taking their goods off the shelves?

Mr. Hackler: This is objected to as immaterial.

Trial Examiner: I will overrule the objection.

You may answer.

The Witness: There's actually—unless you go back and check, it is pretty doggone difficult to tell, Paul. Some of them would say that—cooperate, and you'd never know unless you went back and checked.

Now, the only one I do know that—for sure that did [36] would be Kory's down in Wilmington for a short period of time. This is the only one I know of absolutely that did.

Q. (By Mr. Cummings): This is Pete Givigliano's market?

A. Yes, that's correct.

Mr. Cummings: I have no further questions.

Mr. Hackler: No further questions.

Trial Examiner: That is all, Mr. Finley.

(Witness excused.)

Trial Examiner: Anything else, Mr. Hackler?

Mr. Hackler: Nothing further. We rest.

Trial Examiner: No brief?

You, Mr. Cummings?

(Testimony of Jerry Finley.)

Mr. Cummings: Yes, sir, I will file a brief, yes, sir.

Mr. Hackler: I will file one, too.

Trial Examiner: How much time do you want?

Mr. Cummings: Whenever you say, sir.

Trial Examiner: Is three weeks enough for you?

Mr. Hackler: The maximum, if it suits you. That is the maximum, I guess.

Trial Examiner: No. Thirty-five days is the maximum.

Mr. Hackler: Whatever you say, Mr. Cummings.

Trial Examiner: Today is the 8th. Well, send me a Twenty Six Fed. Servette 37745
brief, if you intend to do so, on or about August 29, at Room 206, 630 Sansome Street, San Francisco 11.

Mr. Hackler: To be received by you on the 29th? [37]

Trial Examiner: Yes.

There being nothing further, the hearing is closed.

(Whereupon, at 11:50 o'clock A.M., Monday, August 8, 1960, the hearing in the above-entitled matter was closed.) [38]

[Endorsed]: Filed August 11, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-L

INDEX
AND
DESCRIPTION OF FORMAL DOCUMENTS

Exhibit 1 (a) Original Charge, dated March 10, 1960.

Exhibit 1 (b) Affidavit of Service of 1(a), dated March 10, 1960.

Exhibit 1 (c) Original Complaint and Notice of Hearing herein, dated July 5, 1960.

Exhibit 1 (d) Affidavit of Service of 1(c), dated July 5, 1960.

Exhibit 1 (e) Answer of Respondent, dated July 12, 1960.

Exhibit 1 (f) Motion to Make More Definite and Certain, dated July 12, 1960.

Exhibit 1 (g) Answer of Counsel for the General Counsel to Respondent's Motion to Make More Definite and Certain, dated July 20, 1960.

Exhibit 1 (h) Order referring Motion to Make More Definite and Certain to Associate Chief Trial Examiner for ruling, dated July 20, 1960.

Exhibit 1 (i) Affidavit of Service of 1(h), dated July 20, 1960.

Exhibit 1 (j) Ruling on Motion (1(f)), dated July 21, 1960.

Exhibit 1 (k) Affidavit of Service of 1(j), dated July 21, 1960.

Exhibit 1 (l) Index and Description of Formal Documents.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 2

To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.:

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight.

Admitted in Evidence August 8, 1960.

85–86 In the United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, JERTBERG, Circuit Judges and CLARK, District Judge

Minute Entry of Argument and Submission—July 12, 1962

This cause coming on regularly for hearing or submission, Mr. Stanley Tobin, argued for the appellant, and Mr. Norton Come, Attorney for the National Labor Relations Board, argued for the appellee, and thereupon the Court ordered the cause submitted for consideration and decision.

87 In United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, JERTBERG, Circuit Judges and CLARK, District Judge

Minute Entry of Order Directing That Opinion Be Filed, etc.—November 26, 1962

ORDERED, That the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

88 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Opinion, November 26, 1962

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge.

JERTBERG, *Circuit Judge:* This case is before the court upon the petition of Servette, Inc. to review a decision and order of

the National Labor Relations Board dismissing an unfair labor practice complaint which had issued upon charges filed by petitioner. The Board's decision is reported at 133 NLRB p. 1501 (Oct. 30, 1961).

The case involves an attempt by the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, to force several retail markets to cease doing business with petitioner with whom the Union was having a labor dispute. It was charged that the Union activity was proscribed by § 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended 29 U.S.C. § 158(b)(4)(i)(ii)(B).[1]

89 The primary facts are not in dispute. Petitioner is a wholesale distributor of specialty merchandise such as candy, liquor, holiday supplies and specialty articles in the area of Los Angeles, California. Included in such merchandise are brand name products, i.e., GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (herein

[1] The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *

"* * * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

"* * * * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,

"* * * * * * *

"Provided, further, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

referred to as Kory, McDaniels and Daylight) separately operate chain retail food supermarkets in the area of Los Angeles, California. All of such markets regularly and customarily purchase, handle, stock and sell products distributed by petitioner.

In early February, 1960, as a result of a labor dispute with petitioner, the above named Union engaged in a strike against petitioner and picketed petitioner's warehouse located in Los Angeles. From February 3rd through March 10th, 1960, the Union, in aid and support of its strike against petitioner, engaged in a campaign to enlist the aid and cooperation of Kory, McDaniels and Daylight to cease doing business with petitioner.

90 In its efforts to win the labor dispute with petitioner, agents of the Union engaged in the following conduct and practices:

1. Told the manager of McDaniels Market No. 14 that the Union had a labor dispute with petitioner. Asked him to cooperate by not dealing with petitioner and by taking petitioner's merchandise off his shelves. Told him that if he failed to cooperate they would pass out handbills to customers. Handbills were passed out but the manager continued his purchases from petitioner. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows:

"To THE PATRONS OF THIS STORE"

"WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

"•BRACH'S CANDY
•SERVETTE CANDY
•GOOD SEASON
SALAD DRESSING
•OLD LONDON PRODUCTS

"The SERVETTE COMPANY which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

2. Asked the manager of McDaniels Market No. 18 to remove merchandise distributed by petitioner from his shelves. At a meeting of the store managers of McDaniels, the managers were told by higher officials to use their best judgment in the matter and to do as they thought wise. The manager of McDaniels Market No. 18 either reduced his purchases from or ceased doing business with petitioner.

91 3. Requested the manager of McDaniels Market No. 25 not to handle petitioner's merchandise. He was shown a copy of the handbill. The manager of McDaniels Market No. 25 either diminished or terminated his business with petitioner.

4. Requested the manager of Daylight Market No. 3 to cooperate with them in their dispute with petitioner by not handling petitioner's products, and told him they were passing out handbills to the customers of those markets which refused to cooperate.

5. Told the manager of Kory's Market No. 6 of the dispute with petitioner, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with petitioner. When the manager told them he would have to check with the main office, handbills were passed out to customers. The next week the manager refused to allow petitioner to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not petitioner's merchandise was on display.

6. Passed out handbills at Kory's Market No. 5.

7. Asked the manager of Kory's Market No. 1 if he would cooperate by removing petitioner's products from his shelves. The manager said he would have to ask advice from his supervisor. Handbilling occurred at this market on two different occasions.

8. Passed out handbills to the customers of Kory's Market No. 2 and told the manager that they would stop handbilling if he would cease handling petitioner's products.

9. Passed out handbills to customers of Kory's Market No. 3.

Handbilling occurred at certain of the markets above mentioned which purchased GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS not from petitioner but from

Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between petitioner and the Union.

92 The Board, with one member dissenting, concluded that the conduct and practices of the Union did not constitute a violation of § 8(b)(4)(i)(B) and that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4).

In its decision and order, the Board stated, in part, as follows:

> "We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the respondent sought to persuade not to do business with Servette were not 'individuals' as that term is used in Section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the Carolina Lumber Company [2] and Minneapolis House Furnishing Company [3] cases. • • •
>
> "We also agree, on the basis of our recent Lohman Sales Company decision,[4] that the Respondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4)."

The dissenting member stated, in part, as follows:

> "As I pointed out in my dissenting opinion in Lohman Sales, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.
>
> "Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities,

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[2] *Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company)*, 130 NLRB p. 1438 (Mar. 17, 1961).

[3] *Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company)*, 132 NLRB p. 40 (July 11, 1961).

[4] *International Brotherhood of Teamsters, etc. Local 537 and Jack M. Lohman*, 132 NLRB p. 901 (Aug. 10, 1961).

constitute violations of Section 8(b)(4)(ii)(B) of the Act."

93 The position of the Board, as stated in its reply brief, appears in the following language:

"In the Board's view, the Union's appeals to the various retail store managers did not constitute a violation of Section 8(b)(4)(i)(B) because, although the forbidden object existed, the means for attaining that object which the Section proscribes was lacking. That is, the only persons induced were the store managers who cannot be regarded as 'any individual employed by any person' within the meaning of Section 8(b)(4)(i)(B). Rather, the store managers must be considered as 'any person' under Section 8(b)(4)(ii), and as such, entitled to protection against the type of conduct or means specifically proscribed therein, namely, threats, coercion, or restraint."

Admittedly, each of the store managers is an individual and each is employed by a person engaged in commerce. It is the petitioner's contention that the clear wording of the phrase "any individual employed by any person" leaves no room for any construction that would exclude "supervisors" from the category described in the phrase. Petitioner also asserts that Congressional history fortifies petitioner's contention that Congressional intent in the choice of the language employed in the phrase was to make it an unfair labor practice for a union to induce or encourage "supervisors" where an object is to force or require any employer "to cease doing business with any other person."

The issue thus created arises under the amendments made to § 8(b)(4)(A) (P.L. 86-257, 73 Stat. 519, approved Sept. 14, 1959). For the amended law, see Footnote 1, *supra*.

Section 8(b)(4)(A) provided:

"It shall be an unfair labor practice for a labor organization or its agents—

"(4) to engage in, or to induce or encourage the *employees of any employer* to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

94 "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." [Emphasis supplied.]

In its Carolina Lumber Company case, *supra*, upon which the Board rested its decision in the instant case, the above Section was held by the Board not to be applicable to inducement of supervisors[6] because they were not employees within the meaning of the Act,[6] and, further, that Section was held not to apply to the inducement of farm, railway, or public employees for the same reason.[7] It is to be noted (see Footnote 1, *supra*) that § 8(b)(4)(i)(B) substitutes the phrase "any individual employed by any person" for the phrase "employees of any employer" as used in § 8(b)(4)(A).

The Board recognized in its decision in the Carolina Lumber Company case, *supra*, "[t]hat the new law bars inducement of a broader category of employed persons tha[n] the old * * *" but concluded from legislative history that " 'any individual employed by any person' in 8(b)(4)(i) refers to supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,' as the term is generally understood. On the other hand, the term 'person' as used in
95 8(b)(4)(ii) would seem to refer to individuals more nearly related to the management level. So construed, 8(b)(4)(i) would outlaw attempts to induce or encourage em-

[6] Title 29 U.S.C., § 152(11), provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] Title 29 U.S.C., § 152(3), in pertinent part, provides:

"The term 'employee' * * * shall not include * * *, or any individual employed as a supervisor, * * *."

[7] *Sheet Metal Workers International Association, Local Union No. 28, (Ferro Co Corporation)*, 102 NLRB 1660 (supervisors); *W. T. Smith Lumber Company*, 116 NLRB 1756, reversed 246 F. 2d 129 (C.A. 5) (railroad employees); *Paper Makers Importing Co., Inc., et al.*, 116 NLRB 267 (municipal employees).

ployees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(ii)."

While the Board concedes that the substituted phrase "any individual employed by any person" for the phrase "employees of any employer," shows on its face a Congressional intent to broaden the category of employed persons and that the literal meaning of the language employed by Congress is broad enough to include "supervisors" in the category described in the Section as "any individual employed by any person," it urges, nevertheless, that to give the phrase the construction urged upon us by the petitioner would be contrary to the purpose of the Act, contrary to Congressional intent, and would render § 8(b)(4)(ii)(B) of the Act meaningless and futile.

Before giving further consideration to the problem before us, we note that the definition of "supervisor" in the Act (see Footnote 5, *supra*) is broad. It means

> "* * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It has long been settled by court decisions that an employee must be classified as a supervisor if he exercises any one of the powers set forth in § 2(11) of the Act. *National Labor Relations Bd. v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948), *cert. denied* 335 U.S. 908; *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 385 (6th Cir. 1949), *cert denied* 338 U.S. 899; *N.L.R.B.* v. *Fullerton Publishing Company*, 283 F. 2d 96 545 (9th Cir. 1960); *N.L.R.B. v. Southern Airways Company*, 290 F. 2d 519 (5th Cir. 1961). Supervisory status is determined by the powers and duties of an employee, and not be his title. *National Lab. Rel. Bd. v. Southern Bleachery & Pr. Wks.*, 257 F. 2d 235 (4th Cir. 1958), *cert. denied* 359 U.S. 911.

The court decisions are in accord with legislative history, as noted in *N.L.R.B. v. Southern Airways Company, supra*, at p. 523:

> "The legislative history of § 2(11) is helpful in this regard. The Senate Report envisaged a 'supervisor' under the Act as being an employee 'vested with such general management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. * * *' Sen. Rep. 105, 80th Cong.; 1 Leg. His. of the L.M.R.A. p. 410; Poultry Enterprises Inc. v. N.L.R.B., 5 Cir., 1954, 216 F. 2d 798, 801. As expressed on the floor of the Senate, to come within this category the individual should 'direct responsibly' the action of employees under him. 2 Leg. His. of the L.M.R.A., p. 1303; N.L.R.B. v. Swift & Co., 9 Cir., 1957, 240 F. 2d 65, 66 note 1. The Conference Report on the Bill later enacted into § 2(11) shows that the definition was intended to cover persons 'generally regarded as foremen and persons of like or higher rank.' 1947 U.S. Code Cong. & Admin. News, pp. 1135, 1141."

It is clear to us that under the old Section insofar as relevant to the problem before us, "employees of an employer" embraced all employees except supervisors as defined in the Act and that there existed but one category of employees who were excluded from the term "employees" and that category was by law defined as "supervisors."

It must be assumed that members of Congress were aware of the definitions contained in the Act and the unanimity of court decisions construing the same.

Since a supervisor is an individual employed by an employer and since by the provisions of the Act (See Footnote 6, *supra*) the term "employee" does not include any individual employed as a supervisor, it appears clear that when Congress
97 amended the phrase "the employees of any employer" to read "any individual employed by any person," Congress intended by the plain, unambiguous language used to include supervisors in the category described in the amendment as "any individual employed by any person."

Under the view that the plain meaning of the language used by Congress was at variance with the purpose of the Act and the intent of Congress, the Board resorted to legislative history and concluded that:

> " 'any individual employed by any person' in 8(b)(4)(i) refers to *supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,'* as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem *to refer to individuals more nearly related to the management level.* So construed 8(b)(4)(i) would outlaw attempts to induce or encourage *employees and some supervisors*, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage *others more nearly related to the managerial level* for the same objectives would be lawful. * * *" [Emphasis ours.]

By such construction, the Board creates two categories of "supervisors" contrary to the definition of the term "supervisor" as used in the Act and contrary to court decisions. In one category are supervisors related to rank-and-file employees, and in the other category are supervisors more related to management. The Board's construction also requires that the phrase "any person engaged in commerce," appearing in § 8(b)(4)(i), shall be given a different meaning than the same phrase appearing in § 8(b)(4)(ii). The Board's construction would place labor organizations in an untenable and precarious position. Such construction in many instances would force labor organizations to run the risk of committing unfair labor practices without knowing which "supervisors" of an employer they could or could not lawfully induce or encourage and which "supervisors" are or are not persons engaged in commerce under § 8(b)(4)(ii).

The Board also contends that if the plain meaning of the language used in the new law be followed, § 8(b)(4)(ii)
98 would be rendered meaningless and futile because the word "induce" appearing in § 8(b)(4)(i) has the same meaning as the word "threaten" appearing in § 8(b)(4)(ii). Our research leads us to the conclusion that the two words have separate and distinct meanings.

The Board contends that the plain meaning of § 8(b)(4)(i) is at variance with the purpose of the National Labor Relations Act and contrary to the intent of Congress.

The Supreme Court, in *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, at pp. 543-544, stated:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, the Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [Footnotes omitted.]

If under the above quoted decision, resort may properly be made to legislative history, we find therein no basis for the Board's contentions.

The basic purpose of the National Labor Relations Act is to promote industrial peace through collective bargaining and an orderly settlement of disputes.

The evil which Congress sought to correct, as stated by Representative Griffin, is as follows:

"Present law provides that it is unlawful for a union to induce or encourage 'employees of any employer' to engage in a strike or 'concerted refusal' to do their work
99 for one of the forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a 'primary employer.' Since farm laborers, railway labor and supervisors are not 'employees' within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.' This change appears in clause 4(i)." (Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520–1523 (G.P.O. 1959)).

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee (105 Cong. Rec. 16589; II Leg. Hist. 1706–1707) with the following comment:

> "In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of 'employees' and supervisors are not 'employees' within the statutory definition.
>
> "• • • • •
>
> "The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue."

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated (105 Cong. Rec. 17882; II Leg. Hist. 1426):

> "There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees themselves."

Senator Humphrey stated, as follows:

> "[T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words 'employees of any employer' to 'any individual employed by any person', and would delete the word 'concerted' • • •
>
> "As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely

individuals; and to substitute the word 'individual' for the word 'employees' would place requests and appeals to them within the prohibition of the law." Remarks of Senator Humphrey on the Goldwater amendment, 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.

In the Senate Committee analysis of this change, it is stated:

"The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * *. (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * *" Senate Committee Analysis, Committee print, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.

We do not agree that the plain wording of the new amendment is at variance with the purpose of the Act or the intent of Congress.

Our attention has been called to the fact that the Second Circuit in *N.L.R.B.* v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 298 F. 2d 105 (2d Cir. 1961), has reached a different result from that reached in this opinion. We have reviewed such opinion but are not persuaded. Rather, we are persuaded by the following quotation from *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), at p. 60, where the Court stated:

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching
101 from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd to entail great hardship. But an application of the principal so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson v. Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the

law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company*, L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners*, 5 A. & E. 804, 816; *Abley* v. *Dale*, L.J. (1851) N.S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung Fook v. White*, 264 U.S. 443, 445; *Commr. of Immigration v. Gottlieb*, 265 U.S. 310, 313."

We disagree with the Board's conclusion that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4). The proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor. Petitioner is a distributor and does not produce any products. The effect of the proviso in the case of a distributor is fully discussed in the opinion of this Court in *Great Western Broadcasting Corporation v. N.L.R.B.*, No. 17698, filed Nov. 9, 1962. We deem it unnecessary to repeat here what is stated in that opinion.

The Board erred in dismissing the unfair labor practice complaint. The Board's decision, findings and order are and each of them is set aside. The cause is remanded to the Board for further proceedings consistent with the views expressed herein.

[File endorsement omitted.]

102 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decree—Endorsed and Filed November 26, 1962

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge

THIS CAUSE came on to be heard upon the petition of Servette, Inc., filed December 14, 1961 to review an order of the NLRB issued by it on October 30, 1961 and

The Court heard arguments of respective counsel on July 12, 1962 and has considered the briefs and transcript of record filed in this Cause. On November 26, 1962 the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Board's decision, findings and order are and each of them is set aside and that this cause be and hereby is remanded to the said National Labor Relations Board for further proceedings consistent with the view expressed in the opinion of this Court.

[File endorsement omitted.]

103 In the United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for Clarification of Remand—December 11, 1962

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The National Labor Relations Board respectfully moves this Court to clarify its opinion filed November 26, 1962, remanding the above cause to the Board for further proceedings.

1. In its opinion, the Court reversed the Board on two counts. First, the Court held, contrary to the Board, that the various retail store managers constituted "any individual employed by any person" within the meaning of Section 8(b)(4)(i) of the Act, and, accordingly, that the action of the Union in appealing to these store managers, with an object of forcing them to cease doing business with Servette, Inc., violated Section 8(b)(4)(i)(B). Secondly, the Court held, contrary to the Board, that the Union's handbilling at the various stores was not protected by the "publicity" proviso to Section 8(b)(4), because the "proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dis-

pute with a distributor," such as petitioner Servette. In
104 this regard, the Court adopted the rationale set forth in its opinion in *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962. The Court remanded the instant case to the Board "for further proceedings consistent with the views expressed herein."

2. In *Great Western*, the Court held that the union's appeals and related conduct, directed to customers of advertisers on the radio station with whom the union had its primary dispute, were not privileged by the "publicity" proviso to Section 8(b)(4) because that merely covered a situation where the primary employer was a manufacturer of a physical product. The Court, however, remanded the case to the Board to determine two questions. First, the Board was directed to determine whether the union's activity constituted "threats, restraint or coercion" within the meaning of Section 8(b)(4)(ii), and second, whether such activity was protected by the free speech provisions of the First Amendment. The Board intends to accept the remand in *Great Western* and make the additional findings directed by the Court.

3. Since the proviso question in this case was decided on the basis of *Great Western*, and since in the latter the Court left open, pending amplification of the Board's views, its conclusion on the further question of whether handbilling and related conduct, though not protected by the proviso, may nonetheless be privileged on other grounds, it would appear that the Board should be free to pass on these other grounds on the remand in this case as well. For, since the Court in *Great Western* has indicated that it cannot finally decide
105 whether handbilling and related activity is violative of Section 8(b)(4)(ii) absent a fuller statement of Board views on the question of whether such activity constitutes "threats, restraint or coercion," or is constitutionally protected, it is hardly likely that it could have decided those questions here. The Court does not discuss those issues in its opinion in this case, and the treatment thereof in the Board decision here was no fuller than that in *Great Western*.

Indeed, if the issues of restraint and coercion and constitutionality are not open on the remand in this case, as they are in *Great Western*, the Board would be placed in an anomalous position, were it desirous of seeking further review of this Court's holding on the scope of the publicity proviso; it would

be required to seek Supreme Court review before that Court had the benefit of the views of this Court on all of the issues which were relevant to a final disposition of the problem.[1]

106 4. The Court's opinion in this case leaves us in doubt as to whether the issues left open on the remand in *Great Western* are left open on the remand here. We therefore request that the Court amend its opinion herein to make clear that, on the remand, the Board may determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Respectfully submitted,

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington 25, D.C., this 11th day of December, 1962.

107 In the United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitioner's Reply to Respondent's Motion for Clarification of Remand—Filed December 21, 1962

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The respondent, the National Labor Relations Board, on December 11, 1962, moved this Court to clarify its Opinion

[1] Nor is a different conclusion required by the fact that, unlike in *Great Western*, the union did not intervene here and specifically raise the restraint and coercion and constitutional questions. The basic question presented is whether the Board properly found that the union's handbilling was not violative of Section 8(b)(4)(ii)(B) of the Act. The Court having rejected the reason assigned by the Board, i.e., that the activity is protected by the proviso, the issue necessarily arises whether the activity is restraint or coercion to begin with, or constitutionally protected. For, unless it amounts to restraint or coercion and is not protected by the Constitution, there can be no violation of Section 8(b)(4)(ii)(B).

filed November 26, 1962, remanding the above cause to the Board for further proceedings consistent with the views expressed in the Court's Opinion. Petitioner takes exception to respondent's Motion and urges upon this Court that its Opinion, holdings and decision in the instant action are clear and proper and need no further clarification.

1. Respondent obviously does not and cannot have any cause to seek clarification of the Court's principal holding in the above case, to wit, that various retail store managers constituted "any individual employed by any person"
108 within the meaning of Section 8(b)(4)(i) of the Act, and, accordingly, the action of the Union in appealing to these store managers with an object of forcing them to cease doing business with Servette, Inc. violated Section 8(b)(4)(i)(B).

2. Respondent, however, urges that this Court should direct the Board to determine whether there was also a violation of Section 8(b)(4)(ii) of the Act notwithstanding the fact that the Court in its Opinion held that the "publicity proviso" to Section 8(b)(4) does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor.

Respondent asks this Court to direct that the Board "determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech."—*Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.*

3. It is true that in *Great Western Broadcasting Corp.* v. *NLRB*, No. 17698, filed November 9, 1962 (and argued the same day as the instant cause), the Court directed the Board to proceed to hear the matter and to determine whether
109 the Union's activity there constituted "threats, restraint, or coercion" and whether such activity was protected by the First Amendment. But it is apparent that these issues were timely raised and argued before this Court in the *Great Western* case and were not in any shape, manner or form addressed to this Court in the instant action.

4. Indeed, the Board in the instant cause, both before this Court and in the proceeding below, assumed and accepted as a fact and as a matter of law that the Union's handbilling of

the various stores doing business with petitioner constituted "threats, restraint or coercion" within the meaning of Section 8(b)(4). See the Board's decision at 133 NLRB 1501 (1961). In that proceeding, the Board's reliance upon *International Brotherhood of Teamsters Local 537 (Lohman Sales Company)*, 132 NLRB No. 67 underscores the Board's conclusion that such activity is presumptively violative of Section 8(b)(4)(ii). Respondent did not challenge this conclusion, though counsel for petitioner noted its importance in oral argument and distinguished the posture of this case with that of *Great Western*.

5. Moreover, at no time did anyone, either in the proceedings before the Board or before this Court, raise the
110 issue of the constitutional free speech protection in the instant case. At the time of oral argument, counsel for petitioner, again distinguishing the fact that the constitutional issue had not been raised in this case though it was being raised in the *Great Western* case, noted that such a constitutional issue was not properly before this Court and that constitutional issues should not be anticipated, citing

> *Longshoremen's Union* v. *Boyd*, (1954) 347 U.S. 222, 223–224;
> *United States* v. *Hayman* (1952) 342 U.S. 205, 223;
> *Paramino Lumber Co.* v. *Marshall* (9 Cir. 1938) 95 F. 2d 203, 206; certiorari denied (1938) 305 U.S. 603.

As the Supreme Court in *Parker* v. *Los Angeles County* (1949) 338 U.S. 327, 333, stated: "This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

6. Furthermore, the statute specifically necessitates that the Court is prohibited from considering objections, and by nec-
essary inference in this kind of case, arguments that had
111 not been urged before the Board. Section 10(e)(f) of the Labor Management Relations Act states:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

The Supreme Court of the United States has recognized the effect to be given to Section 10(e) and has repeatedly held that the failure to raise such an objection, and by inference to urge such an argument, prevents the court from considering such matters. See *NLRB* v. *Local 476 AFL–CIO*, 7 L. Ed. 2d 382; *NLRB* v. *Cheney-California Lumber Co.* 327 U.S. 385, 90 L. Ed. 739; *NLRB* v. *Ochoa Fertilizer Corp.* 7 L. Ed. 2d 312; 49 Stat. 454, as amended, 29 U.S.C. § 160(4).

"As a general proposition * * * points not raised and preserved below will not be considered on appeal unless they amount to 'fundamental error'." 1A *Moore's Federal Practice* 4231. Cf., *Fowler* v. *Crown-Zellerbach Corp.* 163 F. 2d 773 (Ninth Cir., 1947).

112 7. The Court properly did not leave open the issues in the instant action that were properly left open on remand in *Great Western*. The Court decided all the issues that were presented to it and it would now be an abuse of judicial process to raise additional issues that should have been raised by respondent prior to this late stage.

Respectfully submitted,

HILL, FARRER & BURRILL,
By Stanley E. Tobin.
CARL M. GOULD.
STANLEY E. TOBIN.

DECEMBER 17, 1962.

113 [Certificate of service omitted in printing.]

114 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Order Denying Motion—January 22, 1963

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge

On November 26, 1962, this Court filed its opinion remanding the above cause to the board for further proceedings consistent with the views expressed therein.

The National Labor Relations Board has moved this Court to amend its opinion so that the Board on remand may determine whether the handbilling constituted a threat, restraint, or a coercion within the meaning of § 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.

The Board's reliance upon *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962 (9th Cir.) is misplaced. In *Great Western* the labor unions intervened in the proceedings and raised the restraint, coercion and constitutional questions. The first intimation of such grounds in the instant case was raised on the motion for clarification.

The motion of the Board is denied. See *Partenweederei, MS Belgrano,* and *Rudolph A. Oetker* v. *George Weigel,* No. 17178, filed December 11, 1962 (9th Cir.). See National Labor Relations Act, as Amended, 29 U.S.C. § 160(e): "No objection

115 that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[File endorsement omitted.]

116 Supreme Court of the United States
No. ——, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SERVETTE, INC.

Order Extending Time To File Petition for Writ of Certiorari—February 21, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED, That the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 25, 1963.

WM. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of February, 1963.

117 Supreme Court of the United States

No. 1053, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SERVETTE, INC.

Order allowing certiorari—June 10, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and a total of one and one-half hours is allowed for oral argument. The case is set for oral argument immediately following No. 921.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1963